DATO' SAIDIN THAMBY

v.

PP

HIGH COURT MALAYA, SHAH ALAM
SU GEOK YIAM J
[CRIMINAL APPEAL NO: 42-17-2002]
20 MARCH 2011

CRIMINAL LAW: *Prevention of Corruption Act 1961 - Section 3(a)(i) - Corruptly accepting gratification - Ingredients - State Assemblyman alleged to have accepted RM1 million for assisting company to apply for State land - Proof - Prima facie case - Whether ingredients of offence proved beyond reasonable doubt - Trial judge invoking s. 8 of Act when convicting accused - Whether a grave error of law - Whether conviction unsustainable - Prevention of Corruption Act 1961, ss. 3(a)(i) & (ii), 8 - Criminal Procedure Code, ss. 156, 158, 159, 160, 180*

CRIMINAL LAW: *Corruption - Corruptly accepting gratification - State Assemblyman accepting RM1 million for services rendered to a company - Whether constituting 'corruption' - Whether committing no offence in law - State Assemblyman not a member of State Executive Council - Whether entitled to engage in business or business deals - Whether could receive remunerations for services rendered - Prevention of Corruption Act 1961, ss. 3(a)(i) & (ii), 8 - Criminal Procedure Code, ss. 156, 158, 159, 160, 180*

CRIMINAL PROCEDURE: *Trial - Charge - Substitution - Substitution of more serious charge for less serious one - Whether prerogative of Public Prosecutor - Accused charged under s. 3(a)(i) of Prevention of Corruption Act 1961 - Sessions Court invoking s. 8 in convicting accused - Whether accused entitled to prior notice of intention to invoke section - Failure to notify - Whether a gross breach of natural justice - Criminal Procedure Code, ss. 156, 158, 159, 160, 180*

The appellant, the State Assemblyman for the constituency of Paya Jaras, Selangor, had been charged with the offence of corruptly accepting a gratification of RM1 million from one Syarikat Nusantara Sdn Bhd ('Nusantara') under s. 3(a)(i) of the Prevention of Corruption Act 1961 ('PCA') and, upon conviction, was sentenced to one year imprisonment, a fine of RM10,000 in default six months' imprisonment, and a penalty of RM1 million. The evidence as adduced before the learned Sessions Court judge

('SCJ') showed that: (i) at the material time, the appellant and the (former) executive chairman of Nusantara ('SP1') were the Head and Deputy Head respectively of the Selayang UMNO Division, (ii) in January 1995, Nusantara applied to the State Government of Selangor for a piece of land and thereafter SP1, together a director of Nusantara SP10, approached the appellant for assistance; (iii) it was SP1's evidence that when so approached the appellant had solicited for RM2 million from SP10 - RM1 million for himself and RM1 million for SP18, the Menteri Besar of Selangor then; against this evidence, SP10 testified that the appellant had never asked for any bribe from him, but only queried as to whether Nusantara could donate RM2 million to UMNO fund; (iv) having allegedly met SP1 and SP10, the appellant sought the assistance of SP15, the Secretary to the Selangor State Executive Council ('EXCO'), and SP18, and on 4 November 1995, the EXCO approved Nusantara's application; (v) SP18 stated however that the EXCO's decision was purely based on merits, and that there was nothing wrong, in any case, for the appellant to have sought his assistance, or solicited considerations for services rendered; (vi) some 17 months after the EXCO's approval, on 15 March 1997, SP1 met the appellant and gave him a cash cheque of RM1 million, telling the appellant that it was a donation from Nusantara to Selayang UMNO and that the appellant could make use of the money as he deemed fit; (vii) SP1 thereafter sought to contest for the post of Selayang UMNO Division Head, and in relation to that, sent an emissary (SP24) to warn the appellant not to defend his post, failing which 'the case about the cheque' would be reported to the Anti-Corruption Agency ('ACA'); (viii) SP24 testified that upon being so confronted, the appellant did not appear scared and indeed told him that the cheque was given pursuant to a business deal between him and SP1, and that he would be defending his post as Head of Selayang UMNO Division; (ix) SP1 thereafter caused a director of Nusantara to send a letter to the Deputy Prime Minister ('DSAI'), alleging embezzlement of 'RM1 million contribution to Selayang UMNO' by the appellant; (x) a police report alleging blackmailing was subsequently lodged by the appellant against SP1; on the other hand, no police report in relation to the cheque was lodged by SP1; and (xi) following the letter to DSAI, the ACA investigated the complaint, arrested the appellant and had him charged as aforesaid. These facts aside, it was also clear that in convicting the appellant, the SCJ had

preferred to believe the evidence of SP1 to that of SP10, SP15, SP16, SP18 or SP24. It was further the SCJ's stand that the receipt of the RM1 million by the appellant was corrupt because, upon the true construction of s. 8 of the PCA (bribery by member of legislature), it was unlawful of the appellant as a State Assemblyman to have accepted a gratification for helping a member of the public.

In this appeal by the appellant (and cross-appeal by the Public Prosecutor), the primary questions that arose were: (i) whether the SCJ was in grave error in ruling that the prosecution had proved a *prima facie* case against the appellant; and (ii) whether she was also in grave error in invoking s. 8 of the PCA the way she did (without giving notice to the defence).

Held (allowing appeal and dismissing cross-appeal; quashing conviction and sentence; acquitting and discharging appellant):

(1) The way the charge was framed, it was incumbent upon the prosecution to establish at the end of its case a *prima facie* that the appellant had corruptly received the RM1 million cheque as a gratification, being remuneration for assisting Nusantara to procure the approval of the EXCO for its application of the land. The SCJ had to find credible and cogent evidence of the corrupt soliciting of the cheque, or that the acceptance of the cheque was against the law as to render it a corrupt practice. (paras 225 & 244)

(2) The SCJ did not state in detail the reasons why she chose to accept the evidence of SP1 and reject the evidence of other prosecution witnesses such as SP10, SP15, SP16, SP18 and SP24. It therefore fell upon this court to evaluate SP1's evidence in the light of the evidence of the other prosecution witnesses. (para 54)

(3) The SCJ made a grave error when she believed and accepted the evidence of SP1. The SCJ ought to have ruled that SP1 was not a truthful witness and ought to have rejected his evidence for the reason that there was a very high probability that it was fabricated in order to suit his business concerns and political agenda, which were so tightly intertwined, one with the other. SP1 had a motive to give false evidence against the appellant because he had a vested

A interest to ensure that the appellant was convicted so as to prevent him from contesting in the UMNO elections. The failure of the SCJ to direct herself on the issue of whether it was safe to convict the appellant as per the charge solely on the evidence of SP1 amounts to a non-direction. This is
B especially so when the prosecution had elected not to prefer a separate charge against the appellant for soliciting the RM1 million. This aside, the SCJ had also erred when she did not direct herself that SP1 was an accomplice of the first degree, and that, since ss. 14 and 18 of the PCA were not
C applicable to the charge as framed under s. 3(a)(i), she had to find corroboration for SP1's evidence. (paras 260-261 & 273-274)

(4) The SCJ erred in failing to appreciate the evidence of
D prosecution witnesses such as SP10 and SP18. SP10 had categorically said that the appellant did not solicit any bribe, and his evidence was credible and consistent throughout. SP10 had also said that he was threatened with arrest and hit by the ACA officers for not giving a statement consistent
E with that given by the other witnesses that the appellant had solicited the RM2 million for him and SP18. As for SP18, he was firm in saying that it was not unlawful for the appellant to engage in business, or lobby him for approval of land applications, or receive commissions for services
F rendered. Had the SCJ not so erred, she would have ruled, at the close of the prosecution case, that the defence had succeeded in raising a reasonable doubt in the prosecution's case, namely that the cheque was given willingly to the appellant as a commission for the relevant acts done by him,
G and received lawfully and not corruptly as alleged. (paras 194 & 195)

(5) The SCJ erred in not appreciating the serious material contradictions in the evidence of the various prosecution
H witnesses concerning the purpose of the giving of the RM1 million cheque to the appellant. If she had done so, she would have concluded that there was no cogent and reliable evidence that the appellant had corruptly received the RM1 million, namely that SP1 had given the cheque to the
I appellant pursuant to the latter's representation that unless the RM1 million was paid as a bribe to him and another

RM1 million to the Menteri Besar, the EXCO would not approve Nusantara's application. It is important to bear in mind in this respect that the cheque was given to the appellant only one year and five months after Nusantara's application was approved by the EXCO. (paras 258 & 259)

(6) The SCJ erred when she did not consider that it is the prosecution's case that Nusantara's application had succeeded on its own merits. What this means is that the fourth ingredient of the charge, namely that Nusantara's application succeeded because of the assistance given by the appellant, remained unproven. On this ground alone the appeal by the appellant against his conviction, sentence and penalty ought to be allowed. (para 284)

(7) The SCJ had also erred in failing to make any adverse comment on the unprofessional and improper manner in which the ACA officers had gone about their investigations in this case, including the recording of the statements of some witnesses in a hotel room paid for by SP1. The failure had occasioned a serious miscarriage of justice. (para 280)

(8) The appellant's conduct subsequent to the receipt of the RM1 million cheque showed that he did not receive the RM1 million corruptly. The appellant also could not be faulted for banking the cheque into his account, since SP1 had told him that he could make use of the monies. (paras 266 & 280)

(9) The SCJ ought to have considered the issue whether the prosecution had succeeded in showing that the receipt of the gratification was done corruptly by the appellant independently of s. 8 of the PCA. That section was never invoked by the prosecution during the trial, and the SCJ's reliance on the section in convicting the appellant without giving notice to the defence of her intention was a gross breach of natural justice. It is also to be noted that the offence under s. 8 was a distinct and separate offence, and was more serious than the one under s. 3(a)(i). Substituting a more serious charge for a less serious charge is the prerogative of the Public Prosecutor. It follows that it was not open for the SCJ to have called for the appellant's defence under s. 8 of the PCA. (paras 197, 254, 285, 297)

(10) At the close of the prosecution case, there was insufficient evidence for the SCJ to call for the appellant's defence. The SCJ had thus misdirected herself when she ruled at that stage that the prosecution had established a *prima facie* case against the appellant as per the charge. (paras 278 & 323)

Case(s) referred to:

Ahmad Shah Hashim v. PP [1979] 1 LNS 4 FC ***(refd)***
Attorney-General of Ceylon v. De Livera and Anor [1962] 3 All ER 1066 ***(dist)***
Che Man Che Mud v. PP [1994] 4 CLJ 823 HC ***(refd)***
Goh Leng Sai v. Regina [1958] 1 LNS 24 HC ***(refd)***
Hamidon Mat Yatim v. PP [1995] 3 CLJ 724 HC ***(refd)***
Hashim v. PP [1967] 1 MLJ 251 ***(refd)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 1 LNS 96 FC ***(refd)***
Lee Mun Foong v. PP [1976] 1 LNS 57 FC ***(refd)***
Lionel De Silva v. Regina [1956] 1 LNS 61 HC ***(refd)***
Mahesan v. PP [1970] 1 LNS 75 FC ***(refd)***
Mohamed Kassim v. PP [1981] 1 LNS 42 ***(refd)***
Mohamed Long v. PP [1971] 1 LNS 80 FC ***(refd)***
Mohamed Taufik v. PP [1974] 1 LNS 95 HC ***(refd)***
Ng Kok Lian & Anor v. PP [1983] 2 CLJ 247; [1983] CLJ (Rep) 293 FC ***(refd)***
PP lwn. Chellapa Pillai Govindasamy [1994] MLJU LEXIS 830 ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Dato' Sahar Arpan [1999] 3 CLJ 427 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 97 ***(refd)***
PP v. Sally Chan Kit Tong [1991] 1 CLJ 448; [1991] 1 CLJ (Rep) 396 SC ***(refd)***
Ramanathan Chelliah v. PP [2009] 6 CLJ 55 CA ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
Walter Annamunthodo v. Oilfields Workers' Trade Union [1961] AC 945 ***(foll)***
Wong Cheong Kim v. Deputy Public Prosecutor [1962] 1 LNS 207 HC ***(refd)***
Yassin Bachik lwn. PP [1994] 4 CLJ 629 HC ***(refd)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(refd)***
PP v. You Kong Lai [1984] 1 CLJ 379; [1984] 2 CLJ (Rep) 429 ***(refd)***
PP v. Selvarajoo Ramachandran & Ors [2005] 6 CLJ 114 ***(refd)***
Shaiful Idzam Sulaiman v. PP [2004] 2 CLJ 121 ***(refd)***
Sivalingam v. PP [1982] 1 LNS 20 ***(dist)***
Low Seng Wah v. PP [1962] 28 MLJ 107 ***(refd)***

Legislation referred to:

Anti-Corruption Act 1997, s. 1(a)
Criminal Procedure Code, ss. 152, 156, 158, 159, 160, 162, 166, 167, 180(2), 316(b)
Courts of Judicature Act 1964, s. 66

Emergency (Essential Powers) Ordinance 1970, s. 2(1)
Penal Code, ss. 409, 420
Prevention of Corruption Act 1961, ss. 2, 3(a)(i), (ii), 4(a), (c), 8, 9(b), 13, 14, 18

Bribery Act 1954 [Sri Lanka], s. 14
Prevention of Corruption Ordinance 1937 [Sing], ss. 3(a), (b), 4

Other source(s) referred to:
Catherine Soanes & Angus Stevenson, *Concise Oxford English Dictionary*, 11th edn, p 173

For the prosecution - Abdul Razak Musa (Nafhatun Pozi with him) DPPs
For the respondent/appellant - Muhammad Shafee Abdullah (Badrul Munir & Sarah Abishigam with him); M/s Shafee & Co

Reported by Wan Sharif Ahmad

JUDGMENT

Su Geok Yiam J:

[1] There are two appeals. The first appeal which was filed on 1 August 2002 is by Dato' Saidin bin Thamby ("Dato' Saidin"). It is against his conviction for corruption, the sentence of one year imprisonment, a fine of RM10,000 in default six months imprisonment and the imposition of a penalty of RM1 million to be paid to the Federal Government as revenue pursuant to s. 13 of the Prevention of Corruption Act 1961 (the "PCA 1961") within three months of the date of the order of the Shah Alam Sessions Court.

[2] The second appeal which was filed on 8 August 2007 is a cross-appeal by the Public Prosecutor against the inadequacy of sentence (the "cross-appeal").

[3] However, due to an oversight on the part of the registry the cross-appeal was not given a separate registration number.

Background Of The Appeal

[4] Dato' Saidin was charged on 15 September 1999 in the Shah Alam Sessions Court (the "SASC") for committing an offence of corruption under s. 3(a)(i) of the PCA 1961 for corruptly receiving from one Dato' Dr. Hanifah bin Nordin, the

Managing Director of a company by the name of Syarikat Nusantara Network Sdn. Bhd. ("Nusantara"), for himself a gratification of RM1 million *vide* a crossed Malayan Banking cash cheque No. 170871 (the "cheque") as a remuneration for assisting Nusantara in obtaining the approval of the Selangor State EXCO in respect of Nusantara's application for a piece of state land comprised in a portion of Lot 4287, Seksyen Pekan Batu Caves, Mukim Selayang having an area of 209,632.5 square feet (the "land").

[5] The offence is punishable under the same section with a fine not exceeding RM10,000 or to imprisonment for a term not exceeding five years or to both.

The Amended Charge

[6] The amended charge against Dato' Saidin states as follows in Bahasa Malaysia:

> Bahawa kamu pada 15hb Mac 1997, lebih kurang pukul 12 malam, di No. 2, Jalan Selaseh 4, Taman Selaseh, Batu Caves, dalam Daerah Gombak, di dalam Negeri Selangor Darul Ehsan, telah secara rasuah menerima untuk diri kamu suatu suapan, iaitu sekeping cek Malayan Banking nombor 170871 berjumlah RM1 juta daripada Dato' Dr. Hanifah bin Nordin bekas Pengerusi Eksekutif Syarikat Nusantara Network Sdn Bhd sebagai upah kepada kamu kerana telah melakukan suatu perbuatan, iaitu membantu Syarikat itu dalam permohonan tanah kerajaan di sebahagian Lot 4287 Section 4, Pekan Batu Caves, Mukim Batu, Daerah Gombak Selangor, untuk kelulusan Majlis Kerajaan Negeri Selangor, di mana permohonan itu telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri Selangor pada 4hb Oktober 1995 dan dengan itu kamu telah melakukan satu kesalahan dibawah Seksyen 3(a)(i) Akta Pencegahan Rasuah 1961 [Akta 57] yang boleh dihukum dibawah seksyen yang sama. ("the charge")

[7] The underlined word was the only amendment made to the original charge on 31 October 2000 at the close of the prosecution case.

[8] After a full trial, on 1 August 2002, Dato' Saidin was found guilty, convicted as per the charge and sentenced to one year imprisonment, a fine of RM10,000 in default six months imprisonment and also ordered to pay the penalty of RM1 million to the Federal Government by the learned Sessions Court Judge ("SCJ").

[9] Both appeals were mentioned for the first time in the Shah Alam High Court on 16 August 2005.

[10] After several adjournments both appeals were finally heard by me on 28 October 2008.

[11] There were three main reasons for the delay in the hearing of the two appeals. The first reason was because KN Segara J who was initially tasked with hearing the two appeals found that the appeal record was not in order. After hearing clarifications from both parties he ordered amendments to be made to the appeal record. When the amended record of appeal was finally filed, His Lordship was already elevated to the Court of Appeal.

[12] The second reason was that Dato' Muhamad Shafee bin Abdullah ("Dato' Muhamad Shafee"), the learned counsel for Dato' Saidin, had initially objected to me hearing both appeals on the ground that both appeals had already been part heard by KN Segara J.

[13] Subsequently, after the then Right Honourable Chief Judge of Malaya directed *vide* his letter dated 14 February 2008 that I hear both the appeals, the learned defence counsel gave up on his objection.

[14] The third reason is because there were several requests for postponements by Dato' Muhamad Shafee on various grounds, in particular, that he was involved in the hearing of an election petition which needed to be disposed off within six months from the date of filing.

[15] In compliance with my direction both parties filed their written submissions and bundle of authorities.

Grounds Of Appeal

[16] Dato' Saidin has put forth the following grounds of appeal in his petition of appeal dated 21 December 2004:

> 4. Pempetisyen dengan rendah diri telah tidak berpuashati dengan keseluruhan penghakiman Puan Hakim Suraya Othman, Hakim Mahkamah Sesyen Jenayah, Shah Alam berdasarkan alasan-alasan berikut:

A. Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim telah memanggil pihak Pempetisyen untuk membela diri. Puan Hakim Mahkamah Sesyen yang bijaksana sepatutnya mendapati bahawa pihak Pendakwa telah gagal untuk membuktikan kes *prima facie* terhadap Pempetisyen dan sepatutnya telah membebaskannya tanpa memanggil untuk membela diri.

B. Selanjutnya dan/atau secara alternatif, Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta dalam mensabitkan kesalahan terhadap Pempetisyen di akhir kes Pendakwaan walaupun terdapat banyak keraguan yang munasabah yang telah diutarakan oleh pihak Pembelaan.

C. Tanpa prejudis terhadap alasan-alasan umum petisyen yang telah disebutkan, dan hak-hak Pempetisyen untuk menimbulkan semua isu yang telah ditimbulkan semasa perbicaraan berlangsung, berikut adalah, secara terperinci, adalah Alasan-Alasan bagi petisyen ini:

(1a) Puan Hakim Mahkamah Sesyen yang bijaksana terkhilaf dalam fakta dan undang-undang dalam mensabitkan Pempetisyen dibawah Seksyen 3(a)(i) Akta Pencegah Rasuah 1961 (Akta 57) apabila elemen-elemen bagi kesalahan tersebut tidak dibuktikan oleh pihak Pendakwaan. Terutamanya elemen "secara rasuah" tidak dibuktikan langsung. (Sila rujuk mukasurat 1 & 2 Alasan-Alasan Penghakiman).

(1b) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim tidak menyatakan tentang isu pertuduhan di bawah Seksyen 3(a)(i) Akta Pencegah Rasuah 1961 sebagai defektif dan kurang butir-butir. Terutamanya cara kesalahan tersebut dilakukan telah tidak dinyatakan berkenaan dengan Pempetisyen telah bertindak secara rasuah. Selanjutnya pertuduhan tersebut adalah bertentangan dengan keterangan yang dibawa oleh pihak Pendakwaan.

(1c) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk menilai kepentingan P13 (sepucuk surat iringan bertarikh 15hb Mac 1997 bagi satu cek, P12), D15 (sepucuk surat daripada SP1

[Dato' Hanifah bin Noordin] kepada mantan Timbalan Perdana Menteri bertarikh 3hb April 1998) dan D16 (sepucuk surat daripada Nusantara Network Sdn. Bhd. Yang telah ditandatangani oleh SP6 [Lee Kah Hoay] bertarikh 25hb Mac 1998 kepada Mantan Timbalan Perdana Menteri) sama ada diambil secara satu persatu mahupun secara kolektif telah memusnahkan sub-stratum kes Pendakwaan yang mana melalui surat-surat ini Pihak Pendakwaan terpaksa membuat pengakuan bahawa sekurang-kurangnya penerimaan wang tersebut adalah sah manakala dibawah pertuduhan untuk Seksyen 3(a)(i) Akta Pencegah Rasuah 1961 penerimaan wang itu sendiri adalah tidak sah.

(1d) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah dengan secara salah menterjemah objektif dan tujuan disebalik Seksyen 8 Akta Pencegah Rasuah 1961 dan matlamat keseluruhan Akta tersebut. [Sila rujuk mukasurat 20 Alasan-Alasan Penghakiman].

(1e) Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf fakta dan undang-undang apabila Puan Hakim menggunapakai Seksyen 8 Akta Pencegah Rasuah 1961 dan menyatakan bahawa adalah jelas Seksyen 8 Akta tersebut dengan jelas melarang seseorang ahli Dewan Undangan Negeri/"ADUN" untuk menerima sebarang ganjaran dalam kapasitinya sebagai ahli Dewan Undangan Negeri/"ADUN". [Sila rujuk mukasurat 17 Alasan-Alasan Penghakiman].

(1f) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim merujuk Seksyen 8 Akta tersebut dan menggunapakai elemen-elemen dan keterangan dibawah seksyen tersebut walupun sebenarnya Pempetisyen adalah dituduh dan disabitkan dibawah Seksyen 3(a)(i) Akta Pencegah Rasuah 1961. [Sila rujuk mukasurat 17 Alasan-Alasan Penghakiman].

(1g) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila tidak mempertimbangkan bahawa tindakan-tindakan Pempetisyen disini adalah tidak dilakukan dalam kapasitinya sebagai seorang ADUN/Ahli Dewan Undang Negeri. Puan Hakim yang bijaksana selanjutnya dengan khilaf telah merujuk Seksyen 8

A Akta tersebut untuk mendapati elemen "secara rasuah". Adalah penting sekali bahawa apabila Puan Hakim yang bijaksana memanggil untuk Pembelaan oleh Pempetisyen Puan Hakim tidak pernah merujuk pada Seksyen 8 Akta tersebut. Maka dengan itu, Puan Hakim yang bijaksana telah melanggar atas peraturan B keadilan dalam tidak memaklumkan Pembelaan pada setiap masa material bahawa Puan hakim memikirkan Seksyen 8 apabila mensabitkan Pempetisyen dan Puan Hakim tidak pernah memberi Pempetisyen sebarang peluang atau hak untuk membetulkan pendapat C tentative Puan Hakim Mahkamah Sesyen apabila beliau memanggil Pembelaan. Akibatnya, Pempetisyen telah disabitkan kesalahan oleh Puan Hakim Mahkamah Sesyen di bawah maksud Seksyen 3(a)(i) apabila sebenarnya Seksyen 8 merupakan faktor yang mempengaruhi dalam pandangan Puan Hakim. D Pempetisyen, justeru, telah tidak diberi hak untuk didengar dalam konsep ertikata yang sebenar. [Sila rujuk mukasurat 470 & 482 Nota-Nota Keterangan].

(1h) Puan Hakim Mahkamah Sesyen yang bijaksana telah E terkhilaf dalam fakta dan undang-undang apabila Puan Hakim meneliti syarat-syarat di dalam Seksyen 3 Akta Pencegah Rasuah 1961 dan telah menyatakan bahawa apa yang diterima oleh Pempetisyen adalah "suapan" dalam ertikata definisi Seksyen 2 Akta Pencegah Rasuah 1961 yang mana telah diterima secara rasuah F dalam bentuk cek "Malayan Banking" No. 170871 bernilai RM1 juta daripada SP1 (Dato' Hanifah bin Noordin) pada 15.3.1997.

[Sila rujuk mukasurat 8-15 Alasan-Alasan Penghakiman].

G (1i) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah dengan secara khilaf menterjemah kesan-kesan kes-kes seperti *PP v. Datuk Harun bin Haji Idris (No 2)* [1997] 1 MLJ 15, *Lim Kheng Kooi v. R* [1957] 1 MLJ 199 dalam membuat kesimpulan bagi definisi H "secara rasuah"/"corrupt". [Sila rujuk mukasurat 19 Alasan-alasan Penghakiman].

(1j) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan I Hakim bergantung dan mengikut definisi "rasuah" ie, "doing an act knowing that the act done is wrong,

doing so with evil feelings and evil intention" dalam kes *PP v. Datuk Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15, memandangkan Pempetisyen dengan jelas tidak mempunayi *'mens rea'* untuk melakukan perbuatan rasuah. *'Mens rea'* tidak dibuktikan oleh pihak Pendakwaan. [Sila rujuk mukasurat 18 & 19 Alasan-Alasan Penghakiman].

(1k) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mempertimbangkan fakta bahawa apabila Pempetisyen secara terbuka telah mengisyhtiharkan RM1 juta yang telah diberikan kepada beliau melalui teks ucapan beliau pada 29hb Mac 1998 (P43) dipasangkan dengan insiden bersama SP24 (Dato' Rahim bin Osman) yang mencuba untuk 'mengugut' Pempetisyen bagi pihak SP1 (Dato' Hanifah bin Noordin) dengan jelas menunjukkan bahawa Pempetisyen tidak mempunyai *'mens rea'* bagi kesalahan di bawah Seksyen 3(a)(i) Akta Pencegah Rasuah 1961. "Keterbukaan transaksi" menafikan elemen 'tidak jujur' dan ini tidak dipertimbangkan langsung oleh Puan Hakim Mahkamah Sesyen yang bijaksana. [Sila rujuk perenggan 1 di mukasurat 407 Nota-Nota Keterangan].

(1l) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim menyatakan bahawa di bawah Seksyen 8 Akta Pencegah Rasuah 1961 atau Seksyen 2 Ordinan Darurat (Kuasa Penting) No 22/1970 bebanan pada Mahkaamh mungkin akan lebih ringan memandangkan bahawa kedua-dua peruntukan tersebut berkaitan dengan ahli Dewan Undangan Negeri yang melakukan kesalahan semasa memegang jawatan dan dalam kapasiti mereka sebagai seorang ahli.

[Sila rujuk mukasurat 18 Alasan-Alasan Penghakiman].

(1m) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim memutuskan bahawa Seksyen 3(a)(i) Akta Pencegah Rasuah 1961 adalah meliputi dan menyeluruh dan maka dengan itu ia juga meliputi kesalahan rasuah yang dilakukan oleh kakitangan kerajaan dan individu. [Sila rujuk mukasurat 18 Alasan-Alasan Penghakiman].

A

(1n) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim memutuskan bahawa tak kira sama ada Pempetisyen adalah ahli EXCO, ahli Dewan Undangan Negeri, kakitangan kerajaan atau seorang individu adalah tidak penting selagi dapat dibuktikan bahawa apa yang Pempetisyen terima adalah secara rasuah (sila rujuk perenggan 2 di mukasurat 18 Alasan-Alasan Penghakiman), bilamana sebenarnya kenyataan Puan Hakim sendiri bercanggah apabila Puan Hakim memutuskan bahawa di bawah Seksyen 8 Akta Pencegah Rasuah 1961/Seksyen 2 Ordinan Darurat (Kuasa Penting) No 22/1970 bebanan pada Mahkamah adalah lebih ringan sekiranya pertuduhan dibuat di bawah 2 seksyen ini. [Sila rujuk mukasurat 18 Alasan-Alasan Penghakiman].

B

C

D

(1o) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim memutuskan bahawa pihak Pembelaan bersetuju bahawa Pempetisyen telah menggunakan kedudukan dan pengaruhnya untuk melobi pihak-pihak tertentu bagi mendapatkan kelulusan untuk permohonan tanah Nusantara Network Sdn. Bhd. (NNSB). Perkara ini tidak pernah diakui oleh pihak Pembelaan sepertimana yang disokong oleh Nota-Nota Keterangan.

E

[Sila rujuk perenggan 3 di mukasurat 16 Alasan-Alasan Penghakiman].

F

(1p) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim telah gagal untuk mengambilkira fakta bahawa Pempetisyen bukan seorang Ahli EXCO semasa pertemuan yang didakwa di Equatorial Hotel dan malah telah gagal untuk menilai fakta bahawa sebagai seorang ahli Dewan Undangan Negeri yang biasa (Bukan EXCO), Pempetisyen tidak mempunyai tugas atau kuasa untuk meluluskan atau melibatkan diri dalam prosiding untuk meluluskan permohonan tanah dalam apa cara sekalipun.

G

H

[Sila rujuk perenggan 2 & 3 di mukasurat 414 Nota-Nota Keterangan].

I

(1q) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim memutuskan bahawa seseorang ahli Dewan Undangan Negeri walaupun tidak bertindak sebagai ahli Dewan Undangan Negeri adalah tidak dibenarkan untuk mendapat ganjaran dalam memberikan khidmatnya kepada masyarakat awam. [Sila rujuk perenggan 1 di mukasurat 20 Alasan-Alasan Penghakiman].

(1r) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan hakim telah gagal untuk mengambilkira keterangan SP18 (Muhamad b. Muhamad Taib) yang telah menyatakan bahawa adalah amalan biasa bagi seseorang ahli Dewan Undangan Negeri termasuk Pempetisyen untuk melobi dan meminta beliau untuk mempercepatkan atau meluluskan sesuatu permohonan atau projek dalam kawasan pilihan raya mereka dan beliau selanjutnya berkata bahawa permohonan Nusantara Network Sdn Bhd telah diluluskan oleh EXCO berdasarkan pada merit dan tidak melalui dorongan yang tidak wajar. [Sila rujuk mukasurat 4 & 5 Alasan-Alasan Penghakiman dan mukasurat 255-256 Nota-Nota Keterangan].

(1s) Puan Hakim yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mempertimbangkan fakta bahawa kelulusan permohonan tanah terbabit telah dibuat oleh pihak-pihak berkuasa menurut saluran-saluran dan tatacara-tatacara yang betul.

[Sila rujuk mukasurat 221,238 & 254 Nota-Nota Keterangan].

(2a) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta setelah gagal untuk mengambilkira perselisihan yang material dan keterangan yang tidak konsisten oleh kebanyakan saksi-saksi Pendakwaan, khususnya:

(i) Dato' (Dr.) Abu Hanifah bin Noordin (SP1)

(j) Lee Kah Hoay (Frankie Lee) (SP6)

(k) Abu Zarin Yaakob (SP2)

A (l) Mohamad Khalili bin Abdullah (SP11)

(m) Fan Seng Chuan (Henry Fan) (SP8)

(n) Edward Lee Hock Soon (SP9)

B 2(b) Puan Hakim Mahkamah Sesyen yang bijaksana telah gagal untuk mengambilkira keterangan saksi-saksi lain yang mana keterangan mereka adalah menyebelahi Pempetisyen, khususnya:

(i) Chin Sooh Howe (Bill Chin) (SP10)

C (ii) Dato' Abd. Rahim bin Osman (SP24)

(iii) Rahiman bin Selamat (SD9)

(iv) Muhammad bin Muhd Taib (SP18)

D (v) Roslan bin Baharin (SP23)

(vi) Yahaya bin Abdullah (SP12)

(2c) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim telah gagal untuk mengambilkira fakta bahawa saksi-saksi yang berpotensi dan penting terutamanya Kudin (Mohd Basir Nawar Budin) dan beberapa pegawai Badan Pencegah Rasuah telah tidak dipanggil dan ini secara pentingnya telah memprejudiskan pembelaan pihak Pempetisyen.

(2d) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk menilai ketidak tentuan yang jelas berkenaan dengan tarikh pertemuan yang didakwa dilakukan di Hotel Equatorial sebagai keterangan penting terhadap kredibiliti saksi-saksi Pendakwaan.

[Sila rujuk mukasurat 322 Nota-Nota Keterangan].

(2e) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mempertimbangkan fakta bahawa tidak terdapat pertemuan berasingan diantara SP10 (Chin Soon Howe @ Bill Chin) dan Pempetisyen. [Sila rujuk mukasurat 186, 189 Nota-Nota Keterangan].

(2f) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk menilai pemakaian Seksyen 146 dan 153 Akta Keterangan 1950 dalam memberi pertimbangan terhadap kredibiliti dan kebenaran saksi-saksi. [Sila rujuk mukasurat 512 - 514 Nota-Nota Keterangan].

(3a) Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta setelah Puan Hakim mendapati pada keratan baki cek tertera bayaran kepada Mikawa dan dalam kandungan "UMNO CONTRIBUTION" dimana pada cek itu sendiri tertulis RM1 juta tunai dalam cek berpalang dan bahawa resolusi syarikat menyatakan bahawa RM1 juta adalah untuk sumbangan kepada UMNO Selayang, sungguhpun selepas mengambil perhatian tersebut bagi fakta-fakta yang penting tersebut, Puan Hakim yang bijaksana masih membuat kesimpulan bahawa "adalah jelas bahawa RM 1 juta itu adalah untuk Pempetisyen". [Sila rujuk perenggan 3 & 4 di mukasurat 10 & 11 Alasan-Alasan Penghakiman].

(3b) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim telah gagal untuk mengambilkira fakta bahawa apabila Pempetisyen diberi cek pada 15.3.1997, P13 (surat iringan) tidak disertakan bersama cek tersebut. Puan Hakim juga gagal untuk mengambilkira penjelasan Pempetisyen bahawa beliau kurang jelas tentang apakah sebenarnya tujuan cek tersebut ie sama ada bayaran adalah untuk dirinya atau untuk SP10 (Chin Sooh Howe @ Bill Chin) atau gantirugi kepada pengarah-pengarah. Selanjutnya, dakwaan-dakwaan tidak jujur oleh SP1 (Dato' Hanifah bin Noordin), SP6 (Lee Kah Hoay) bahawa surat tersebut memang wujud hanya menunjukkan *mala fide* saksi-saksi tersebut dalam keterangan mereka untuk membabitkan Pempetisyen dan justeru memberi kesan yang besar terhadap kredibiliti mereka.

Maka Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim membuat kesimpulan bahawa sama ada P13 (surat iringan) diberi bersama dengan P12 (cek tersebut) adalah tidak mustahak.

A [Sila rujuk mukasurat 11 Alasan-Alasan Penghakiman].

[Sila rujuk perenggan 5 & 6 di mukasurat 436 & 475 Nota-Nota Keterangan].

(3c) Puan Hakim Mahkamah Sesyen yang bijaksana telah
B terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mengambil perhatian keterangan SP8 (Fan Seng Chuan) apabila beliau menyatakan bahawa beliau telah dipaksa untuk menandatangani resolusi untuk meluluskan pembayaran
C RM1 juta dan fakta bahawa beliau tidak tahu secara jelas dan tepat untuk apa wang itu dikeluarkan.

[Sila rujuk mukasurat 168 Nota-Nota Keterangan].

(3d) Puan Hakim Mahkamah Sesyen yang bijaksana telah
D terkhilaf dalam undang-undang dan fakta apabila Puan Hakim gagal untuk mengambilkira fakta bahawa walaupun tidak ada rundingan selanjutnya diantara Pempetisyen dan SP1 (Dato' Hanifah bin Noordin), ini tidak bermakna bahawa RM1 juta yang diterima oleh Pempetisyen adalah bukan gantirugi kepada SP10 (Chin
E Sooh Howe @ Bill Chin), antara kemungkinannya. [Sila rujuk perenggan 3 mukasurat 13 Alasan-Alasan Penghakiman].

(3e) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang dengan tidak
F mengambil perhatian fakta bahawa selepas cek tersebut diserahkan kepada Pempetisyen oleh SP1 (Dato' Hanifah bin Noordin), Pempetisyen menghadapi kesulitan untuk mengatur satu pertemuan dengan beliau untuk bertanyakan tentang tujuan sebenar cek tersebut.
G Malahan, Puan Hakim yang bijaksana telah gagal untuk menilai fakta bahawa pada satu ketika apabila Pempetisyen dapat berkomunikasi dengan SP1 untuk bertanyakan tujuan wang tersebut, SP1 telah memberitahu beliau bahawa wang tersebut adalah
H dianggap olehnya untuk membuat apa-apa bayaran yang difikirkan sesuai.

[Sila rujuk mukasurat 437-438 dan 483 Nota-Nota Keterangan].

(3f) Puan Hakim Mahkamah Sesyen yang bijaksana telah
I terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mengambilkira keterangan

SP6 (Lee Kah Hoay) berkenaan dengan fakta bahawa SP1 (Dato' Hanifah bin Noordin) tidak dapat mengemukakan satu resit bagi RM1 juta tersebut.

[Sila rujuk mukasurat 139-140 Nota-Nota Keterangan].

(3g) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mempertimbangkan fakta bahawa SP1 tidak pernah menimbulkan isu tentang wang RM1 juga tersebut semasa mesyuarat-mesyuarat UMNO Selayang.

[Sila rujuk mukasurat 40, 41 & 429 Nota-Nota Keterangan].

(3h) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim gagal untuk melihat fakta bahawa SP1 (Dato' Hanifah Noordin) mempunyai motif politik dengan membantu penangkapan Pempetisyen dan bahawa dia tidak mahu Pempetisyen mencabar kedudukannya di pemilihan UMNO bahagian.

[Sila rujuk mukasurat 269-273 Nota-Nota Keterangan].

(3i) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim gagal untuk mempersoalkan keakraban yang luarbiasa di antara SP1 (Dato' Hanifah Noordin) dan pegawai-pegawai Badan Pencegah Rasuah dalam keadaan yang boleh dianggap tidak wajar.

(3j) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Puan Hakim gagal untuk menyatakan tentang isu "salah laku" pegawai-pegawai Badan Pencegah Rasuah, penangkapan Pempetisyen yang tidak wajar, pelanggaran prosedur-prosedur dan layanan buruk terhadap SP10 (Chin Sooh Howe @ Bill Chin).

[Sila rujuk mukasurat 191, 197, 198, 485 dan 565 Nota-Nota Keterangan].

(3k) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mengambilkira keterangan

SP24 (Dato' Abdul Rahim Osman) – yang memberi maklumat kepada Pempetisyen bahawa terdapat ugutan daripada SP1 (Dato' Hanifah Noordin).

[Sila rujuk mukasurat 272 dan 407 Nota-Nota Keterangan).

(3l) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mempertimbangkan laporan polis – D14 yang telah dibuat oleh Pempetisyen berkenaan dengan ugutan-ugutan daripada SP1 (Dato' Hanifah bin Noordin).

[Sila rujuk mukasurat 407 Nota-Nota Keterangan].

(3m) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim telah gagal untuk mempertimbangkan fakta bahawa adalah aneh bahawa SP1 (Dato' Hanifah bin Noordin), seorang akauntan dan mempunyai bertahun-tahun pengalaman tidak mengetahui dengan tepat prosedur yang terlibat dalam proses pendermaan kepada UMNO Selayang.

[Sila rujuk mukasurat 31, 34, 253 Nota-Nota Keterangan].

(4) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam udang-undang dan fakta apabila Puan Hakim telah gagal untuk menyatakan bahawa Pempetisyen tidak mengambil tawaran saham-saham oleh SP11 (Mohd Khalili bin Abdullah) dan selanjutnya, bahawa RM230,000 yang diberi kepada SP11 (Mohd Khalili bin Abdullah), Pengarah Syarikat Laluan Angsana Sdn Bhd adalah tanpa sebarang syarat.

(Sila rujuk perenggan 4, 5 & 6 di mukasurat 437 dan 476 Nota-Nota Keterangan].

(5) Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila telah gagal untuk memberi perlindungan yang wajar dan terjemahan kepada Seksyen 11 dan 15 Akta Keterangan 1950. [Sila rujuk mukasurat 511-515 Nota-Nota Keterangan]

(6) Terdapat penangguhan yang melampau dalam penerimaan Alasan-Alasan Penghakiman. Penghakiman Lisan telah diberikan pada 1hb Ogos 2002. Alasan-Alasan Penghakiman dan Nota-Nota Keterangan yang mana diberi melalui suatu surat yang bertarikh 10hb September 2004, hanya diterima pada 28hb September 2004, tanpa ekshibit-ekshibit. Walaubagaimanapun, Penghakiman bertulis yang sekarang bertarikh 1hb Ogos 2002, walaupun sesalinan penghakiman tersebut tidak tersedia kepada Pempetisyen semasa 2 tahun yang material walaupun terdapat permohonan yang berkali-kali oleh Peguam Pempetisyen, melalui bertulis mahupun lisan.

(7) Dalam membuat keputusan terhadap mitigasi hukuman Puan Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila Puan Hakim tidak memberi pertimbangan yang cukup terhadap faktor-faktor mitigasi yang telah dirayu oleh Pempetisyen. Pempetisyen akan bergantung pada faktor-faktor mitigasi dan fakta-fakta yang telahpun dirayu semasa perbicaraan berlangsung, *inter alia*.

(8) Oleh yang sedemikian, Perayu memohon kepada Mahkamah yang Mulia ini agar sabitan kesalahan dan hukuman yang dijatuhkan terhadap Pempetisyen diketepikan/dan atau digantikan dengan apa jua perintah yang difikirkan adil dan saksama.

[17] The Public Prosecutor has put forth the following grounds of appeal in the Malay language in its petition of appeal dated 21 September 2004:

3. Perayu tidak berpuas hati dengan keputusan hukuman penjara satu tahun tersebut dan merayu atas alasan-alasan berikut:

3.1. Hukuman penjara yang dijatuhkan adalah tidak memadai dengan kesalahan yang telah dilakukan oleh Responden.

3.2. Puan Hakim Mahkamah Sesyen yang bijaksana gagal memberi pertimbangan yang sewajarnya kepada prinsip-prinsip penghukuman dalam menjatuhkan hukuman penjara tersebut.

3.3. Puan Hakim Mahkamah Sesyen yang bijaksana telah khilaf kerana gagal mengambil kira perlunya hukuman yang boleh menjadi pengajaran kepada bakal-bakal pesalah dan boleh menghindarkan kesalahan yang sama berulang.

A

3.4. Puan Hakim Mahkamah Sesyen yang bijaksana gagal mempertimbangkan faktor kepentingan awam dalam menjatuhkan hukuman yang dikenakan terdapat Responden memandangkan kedudukan Responden sebagai Ahli Dewan Undangan Negeri (ADUN).

B

3.5. Puan Hakim Mahkamah Sesyen yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila memberatkan pertimbangan kepada faktor umum Responden dan merupakan seorang pesalah pertama dalam menjatuhkan hukuman itu.

C

3.6. Puan Hakim Mahkamah Sesyen yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila menjatuhkan hukuman yang tidak memadai dan tidak mencerminkan pertimbangan beliau berkenaan kedudukan Responden sebagai seorang ADUN yang telah diberikan

D

amanah.

4. Oleh yang demikian pihak Perayu dengan rendah diri memohon supaya hukuman penjara yang dikenakan oleh Mahkamah Sesyen ditambah dengan sewajarnya bersesuaian dengan kesalahan yang telah dilakukan.

E

Decision Of This Court

[18] On 27 April 2009 after having considered the appeal record, the written and oral submissions of both the parties and the

F

authorities cited by them, I allowed Dato' Saidin's appeal.

[19] I, accordingly, set aside his conviction, sentence and penalty and ordered that he be acquitted and discharged. I also dismissed the Public Prosecutor's cross-appeal on sentence (the "said decision").

G

[20] The Public Prosecutor is dissatisfied with the said decision and has filed a notice of appeal to the Court of Appeal.

[21] Below are the reasons why I made the said decision.

H

Facts And Background Of The Case Before The Learned SCJ

[22] First and foremost I shall deal with the facts and background of the case before the learned SCJ.

I

[23] At the material time, Dato' Saidin was a member of the Selangor State Legislative Assembly being the State Assemblyman for the constituency of Paya Jaras in Selayang. He was not the State Assemblyman for the constituency of Gombak. He was also not a member of the Selangor State EXCO. However, he was also a member of the Land Committee for the district of Gombak and the Development Committee for the district of Gombak.

[24] Nusantara was incorporated on 17 September 1994 with the object of developing any land wheresoever situated in Selayang. SP1 bought it as a shell company. On 31 October 1994, the shares in Nusantara were transferred to SP1 and SP11, both of them holding one share each. There were four directors. They were SP1, SP2, SP11 and Mohdi Maslan. All four directors were UMNO members.

[25] Nusantara was interested in applying for the land with the object of developing the land as a commercial centre to be named "Selayang Business Park" (the "project"). The land was about 4 acres in area. It was situated next to the District Mosque in Batu Caves in the Gombak area. There were in existence on the land nine bungalows being the government quarters for officers working in the Gombak Land Office.

[26] Since Nusantara did not have experience concerning land matters Nusantara had entered into a joint venture agreement, P3(I-H), with another company, namely, Syarikat Adiras Sdn. Bhd. ("Adiras"). The directors of Adiras were SP10, Bill Chin Kok Howe, his wife, Madam Ho Wan Jin, and SP6, Frankie Lee Kah Hoay. It was agreed between the two companies that Nusantara's responsibility was to get the land whilst Adiras's responsibility was to get the financing for the project. Adiras was also responsible for the management, administration and the marketing of the project. Article 10 of the joint venture agreement stipulated that 15% of the profits would go to Nusantara and 85% of the profits would go to Adiras. Any losses would be borne solely by Adiras.

[27] In his examination-in-chief, SP1 said as follows in the Malay language at p. 22 of the appeal record in the national language:

> Nusantara tidak mahu terlibat dengan apa bentuk apa pun mengenai hal kewangan termasuk apa-apa bayaran kepada sesiapa. Kita buat ini kerana kami baru dalam business ini dan tidak mahu terlibat dengan apa-apa loan.

[28] Nusantara and Adiras forwarded their joint application for the land signed by SP1 together with all the relevant documents to the Gombak land office *vide* its letter dated 7 January 1995, P2 ("Nusantara's application").

[29] Apart from Nusantara and Adiras, there were two other companies which also submitted their respective applications for the land. They are Syarikat Shah Alam Properties and Latar Bumi Sdn. Bhd.

[30] The directors of Nusantara, SP1, Datuk Dr. Abu Hanifah bin Noordin, SP2, Abu Zarin bin Yaakob, SP11, Mohd Khalili bin Abdullah and Mohdi Maslan (who was not called as a witness) together with two directors of Adiras namely, SP6, Lee Kah Hoay ("Frankie Lee"), SP10, Chin Soon Howe ("Bill Chin") then approached Dato' Saidin in January 1995 to seek his help to ensure that their efforts to obtain the land would be successful. Thereafter they met Dato' Saidin several times regarding the same matter. SP1, in his oral evidence before the learned SCJ, said that Dato' Saidin in his capacity as the Division Head of the Selayang UMNO branch had solicited from Nusantara through Bill Chin a sum of RM1 million for himself and another RM1 million for SP18, the then Menteri Besar of Selangor.

[31] SP1 said that in March 1995 they met Dato' Saidin in the Equatorial Hotel, in a private room in the Chinese restaurant, for dinner. After dinner SP1 said Bill Chin asked them to leave him alone with Dato' Saidin in the private room. So SP1 and the others left the private room. Subsequently, Bill Chin and Dato' Saidin came out of the room and Bill Chin saw Dato' Saidin to the latter's car. After that Bill Chin came to see SP1 privately and told SP1 that Dato' Saidin wanted RM2 million to support their application for the land. RM1 million was for Dato' Saidin and the other RM1 million was for the Menteri Besar, SP18.

[32] SP1 said he was shocked and disappointed because he thought Dato' Saidin would help them as the head of their division but instead he wanted money. SP1 said he lost his respect for Dato' Saidin as a result of that. He told Bill Chin, under the joint venture agreement, it was Bill Chin's responsibility not Nusantara's. SP1 continued as follows in the Malay language at p. 27 of the appeal record in his examination-in-chief:

Dalam joint venture tugas kami untuk dapatkan tanah dan apa-apa mengenai kewangan merupakan tanggungjawab Adiras dan bukan Nusantara. Bill Chin kata that is what that has got to be done to get the job.

[33] SP1 said a few days later, SP11 informed SP1 that Dato' Saidin had asked him whether he could be given 5% of the profit of the project by Nusantara.

[34] SP1 also said after Nusantara terminated the joint venture agreement with SP10, Bill Chin; Bill Chin harassed him, SP2, Abu Zarin and Dato' Saidin seeking a settlement of RM1.5 million for wrongful termination and also a sum of RM400,000 as his expenses. SP1 said Dato' Saidin asked him to settle the matter out of court with the 5% that Bill Chin had given to Dato' Saidin from Bill Chin's 85% share of the project because he did not want Bill Chin to disclose in court that he had promised Dato' Saidin 5% of his 85% share in the project.

[35] According to SP1, Dato' Saidin obtained a copy of Nusantara's working paper in respect of its application for the land. He then made some amendments to the working paper. According to SP28, Mohd Jamidan bin Abdullah, on 29 March 1998, when the Anti-Corruption Agency ("ACA") officers searched Dato' Saidin's house they found the following documents which were connected to Nusantara's application:

(1) P7, a letter from SP1 to Dato' Saidin requesting the latter's assistance in the matter;

(2) P28, a letter from SP11, requesting Dato' Saidin's assistance in the matter;

(3) P24, a yellow file containing documents relating to Nusantara's application;

These documents are stated in the search list, P44.

[36] Nusantara's application was processed at the Gombak district land office level and thereafter forwarded to the Administrator/Director of Lands & Mines, Selangor and, subsequently, to the Secretary of the Selangor State EXCO, namely, SP15, Zulkepli bin Ahmad.

[37] SP15, the Secretary of the Selangor State EXCO testified that Dato' Saidin asked him to refer Nusantara's application to SP18, the then Menteri Besar of Selangor with the hope that Nusantara's application can be tabled at the meeting of the Selangor State EXCO.

[38] On 4 October 1995, the Selangor State EXCO approved Nusantara's application subject to the payment of RM5,659.736 as the premium for the land (the "land premium") and the shifting of the nine government bungalows to another location. The letter of approval was dated 4 November 1995, P8. Unfortunately, Adiras was initially unable to get a loan from a bank to pay the premium which was supposed to be paid within three months from the date of the letter. Nusantara requested for and was given an extension of three months to pay the land premium. Subsequently, Adiras was able to obtain a loan from MBSB. But Nusantara terminated the joint venture agreement with Adiras citing three reasons *vide* its letter dated 13 August 1996 signed by SP2 and SP11. The three reasons are as follows:

(1) misrepresentation that Adiras is a developer company and Bill Chin is a developer;

(2) Bill Chin's failure to obtain financing for the project; and

(3) Adiras's failure to obtain a guarantee and indemnity for the proposed change of the land to the bank.

[39] Nusantara then entered into a fresh joint venture agreement dated 4 October 1996, P10 (1-10), with Penaga Ventures Sdn. Bhd. and SP9, Edward Lee Hock Soon, a shareholder of Penaga Ventures Sdn. Bhd. They took over 75% of Nusantara's shares. The director who represented SP9, Edward Lee Hock Soon, in Nusantara was SP6, Frankie Lee Kah Hoay, a former director of Adiras.

[40] According to SP11, it was Dato' Saidin himself who personally handed over to him, the letter of approval of Nusantara's application dated 4 November 1995, P8.

[41] However, according to SP18, the then Menteri Besar of Selangor, Nusantara's application succeeded on its own merits.

[42] SP1 further said that after Nusantara had paid the land premium *vide* a loan taken by Penaga Ventures Sdn. Bhd, he would often meet up with Dato Saidin. During one of those meetings on 2 January 1997, Dato' Saidin asked him to stay back after an UMNO division meeting in Taman Selayang. So he went into the office of Dato' Saidin who was at that time the head of the Selayang UMNO division. While he was in Dato' Saidin's office, Dato' Saidin asked him for RM2 million.

[43] At p. 33 of the appeal record SP1 said, as follows in the national language, in his examination-in-chief:

> Dia tanya lagi bila hendak bayar 2 juta.
>
> Ini peristiwa pertama dimana OKT directly minta 2 juta. Sebelum ini melalui Bill Chin.
>
> Saya kata kami telah jual saham Nusantara dan Nusantara hanya ada saham sebanyak 25% dan kami bukan lagi Pengarah. Saya beritahu kami telah got rid of Adiras Sdn. Bhd therefore payment promised by Bill Chin for Adiras is no longer capable of being paid and when we discussed with the new shareholder on the take over of the company, we did not discuss specifically about this 2 million. However I may be persuaded to convince the directors to give an outright 2 million to UMNO. Especially when UMNO has difficulty in coming up with its own building but even so after the project has been launched.
>
> Dato' Saidin said no no. I have an agreement with Bill Chin for 2 million. 1 million due to me and 1 million for the Menteri Besar. The 1 million due to me can be deferred but the 1 million due to Menteri Besar must be paid now. I said I cannot convince the directors to pay to individuals. I don't know whether it was very clear to him because it was a heated argument. It was clear to me whether he got my message or not.
>
> He said he wants his money in cash then later on after some argument he said he did not mind taking a cash cheque.
>
> I went to see Edward Lee Hock Soon to tell him of this. Edward Lee Hock is from Penaga Ventures. I told him that there was a lot of pressure for this cheque to be produced and he said he will talk to Board of Directors about a donation to UMNO. I told him about request of a cash cheque.

[44] SP1 continues as follows in the Malay language at p. 34 of the appeal record:

A Saya jumpa Edward Lee dalam bulan January 1997. I have to put a lot of pressure to give a cash cheque and eventually when it was agreed to be paid. We met on 15/3/1997 for dinner at Pan Pacific Hotel, myself, Edward Lee and Frankie Lee.

Edward Lee beri cheque pada saya untuk diserahkan pada Dato' Saidin.

B

Pohon rujuk satu cek Maybank berjumlah 1 juta. Saya cam cek ini. Ini cek Nusantara Network sebanyak 1 juta. Inilah cek yang diberi oleh Edward Lee kepada saya.

C Mahkamah: ID12 bertarikh 15/3/97 berjumlah 1 juta. Made payable to cash signed by Abu Zarin Yaacob and Edward Lee and the cheque was crossed.

Saya biasa dengan tandatangan Abu Zarin dan tandatangan Edward Lee saya pernah lihat pada agreement.

D

Syarikat yang keluarkan cek ialah Nusantara Network Sdn. Bhd.

Cek ini diiringi dengan surat.

TPR: Satu surat dari Nusantara Network bertarikh 15/3/1997 dirujuk.

E

Ini surat diberi pada saya oleh Frankie atau Edward tak pasti tetapi cek saya pasti diberi oleh Edward Lee.

Mahkamah: ID13.

F

Surat ini memaklumkan duit ini untuk UMNO Selayang dan ditandatangani oleh Frankie Lee.

[45] SP1 continues as follows in the Malay language at p. 35 of the appeal record:

G

Saya sedar cek ini untuk UMNO Selayang. Saya telah bincang dan saya buat seperti apa yang saya harus buat.

We had a discussion on 2 January 1997 where I said director will not pay to individual but will pay to UMNO Selayang. Whether he agreed to that or not I do not know.

H

This was my understanding with him on that day. Whether OKT misunderstood it or not I do not know.

Saya dapat cek dan surat ini sekali dalam sampul.

I

The shareholders acted according to what we believe to give 1 million to UMNO Selayang but under pressure we made it in cash but took the precaution of crossing the cheque.

Semasa terima cek dari Edward Lee, cek telahpun dicross.

I asked Edward why he crossed the cheque and he said it is a precautionary move.

Selepas itu saya telefon Dato' Saidin, dia di Perangsang Templers golf dan saya tidak dapat hubunginya kerana telefon ditutup.

[46] According to SP1, on the night of 15 March 1997, which is about one year and five months after Nusantara's application received the approval of the Selangor State EXCO, he went to Dato' Saidin's house and in the study of Dato' Saidin he handed over to Dato' Saidin an envelope containing the cheque for RM1 million together with a covering letter, P13. The cheque although crossed also had the word "cash" written in the space allocated for the name of the payee.

[47] At p. 35 of the appeal record he says as follows in the Malay language:

Dekat pukul 12.00 saya dapat hubunginya di car phone. Dia suruh datang sekarang dan hampir pukul 12.30 malam saya jumpanya pada 15.3.1997.

Saya jumpanya di rumahnya di Taman Selasih, dia bawa saya ke bahagian tambahan di rumahnya kerana ada orang di rumahnya. Saya serahkan envelope kepadanya yang mengandungi cek dan dia terima. Selepas bagi envelope, kita bincang hal lain kerana ada orang di rumah.

[48] SP1 said that the RM1 million cheque was a political donation by Nusantara to the Selayang UMNO division of which Dato' Saidin was the head. It was a contribution towards the cost of the construction of a new building to house the Selayang UMNO division office. That was why he made sure the cheque was crossed so that Dato' Saidin could not take the money for himself.

[49] Subsequently, on 25 March 1998, which was slightly more than a year after SP1 had given the cheque to Dato' Saidin at Dato' Saidin's house, SP6 ("Frankie Lee") sent a letter dated 25 March 1998, D16, to Datuk Seri Anwar bin Ibrahim ("DSAI")

A the then Deputy Prime Minister to complain about the failure of Dato' Saidin to issue a receipt for the RM1 million cheque and the alleged embezzlement by Dato' Saidin of the RM1 million contribution to the Selayang UMNO division because although the RM1 million had been given to Dato' Saidin a year earlier there
B was still no sign of the construction of the Selayang UMNO building a year later. As the Deputy Prime Minister, DSAI was tasked at that time with the responsibility of overseeing the ACA. It was this letter of complaint that led to the arrest of Dato' Saidin and his subsequent prosecution in court. SP1 also
C personally wrote a letter of complaint, dated 3 April 1998, D15, to DSAI.

[50] During the trial in the SASC, the prosecution called a total of 28 witnesses. At the close of the prosecution case the learned
D SCJ found that the prosecution had succeeded in proving a *prima facie* case against Dato' Saidin as per the charge. The learned SCJ, accordingly, ordered him to make his defence on the charge.

[51] Dato' Saidin made his defence by opting to give evidence on
E oath as SD1. He also called eight other witnesses. They are SD2, Hj. Azmi bin Jusoh, SD3, Meor Arif bin Ahmad, SD4, Aminuddin bin Mohd Yusoff, SD5, Faridah bt Hitam, SD6, Gurubachan Singh Johal s/o Amar Singh, SD7, ASP Abd Wahab bin Harun, SD8, Rizuan bin Ab Hamid, and SD9, Rahiman bin Selamat.

F **[52]** In his defence Dato' Saidin admitted that he had asked, SP18, the then Menteri Besar of Selangor to assist Nusantara's application. Dato' Saidin had two meetings with SP18, the then Menteri Besar of Selangor in connection with Nusantara's application.

G

[53] At the close of the defence case the learned SCJ ruled that Dato' Saidin had failed to raise any reasonable doubt in the prosecution case. She was satisfied that the prosecution had proven the charge against Dato' Saidin beyond all reasonable
H doubt. She found Dato' Saidin guilty as charged. She duly convicted and sentenced him.

[54] Since the learned SCJ did not state in detail the reasons why she chose to accept the evidence of SP1 and to reject the
I evidence of SP8, SP10, Bill Chin, SP15, the Secretary to the State EXCO, SP16, SP18, the then Menteri Besar of Selangor,

and SP24 it becomes necessary for this court to evaluate SP1's evidence in the light of the evidence of the other prosecution witnesses. For that purpose the court shall set out below the evidence of SP2, SP3, SP6, SP7, SP8, SP9, SP10, SP11, SP15, SP16, SP18, SP23 and SP24.

Evidence Of SP2, Abu Zarin

[55] In his examination-in-chief, SP2 said Bill Chin informed him in Warong Taman Bidara that he was informed by Dato' Saidin that Dato' Saidin can get the approval of the State EXCO but Bill Chin has to come out with "habuan 2 juta" in the national language or commission of 2 million as political fund.

[56] In his cross-examination, SP2, said he knew that Bill Chin was asking for RM2 million as compensation for the termination of the joint venture agreement.

[57] SP2 also said Bill Chin told him in February or March 1995 in Warong Taman Bidara that he had met Dato' Saidin and Dato' Saidin had asked for "habuan 2 juta" in the national language or 2 million commission for political fund but Bill Chin did not mention it was for UMNO.

[58] He further said that Penaga Ventures's responsibility was to implement the project, to pay the 2 million for the political fund and the 1 million to SP1 as the advance for the 25% shares held by SP1 being payment for expenses incurred by Nusantara.

Evidence Of SP3, Lhow Dai Ying

[59] SP3 is the finance manager of Bennes Engineering Bhd. It is a holding company with a few subsidiaries including Nusantara and Penaga Ventures Sdn. Bhd.

[60] In his examination-in-chief, he said there was a voucher, D20, for the cheque. It was prepared by SP4, Zarina, under his instruction. In D20 it is stated that the RM1 million was an advance to Mikawa Sdn. Bhd., a sub-contractor of Bennes Engineering Bhd and payment is by the cheque. SP3 signed on top of the words "checked by" in the voucher. He said SP6 and SP9, Edward Lee directed him to issue the cash cheque but he did not know to whom it was for. They asked him to write Mikawa while waiting for the receipt. He was later told that the cheque was a contribution to UMNO.

[61] When he was cross-examined he agreed that if the RM1 million was an UMNO contribution, the cheque could not have been written as a cash cheque. He also agreed that if the RM1 million was an UMNO contribution, the voucher, D20 should not have been written for Mikawa Sdn. Bhd.

Evidence Of SP6, Frankie Lee

[62] SP6, in his examination-in-chief, said that the cheque was Nusantara's cheque, signed by SP2 and Edward Lee. It was issued out on the instructions of SP1. SP1 asked SP6 to discuss with Edward Lee for the issue of the cheque to Dato' Saidin. SP1 told SP6 that it was already agreed earlier by Bill Chin to give RM1 million to Dato' Saidin.

[63] SP6 said he told SP1 there was no necessity to give Dato' Saidin the RM1 million because the joint venture agreement between Nusantara and Adiras had been terminated. Furthermore, Nusantara had not made any profit yet. But SP1 pressured SP6 on several occasions to issue the cheque in the form of a cash cheque.

[64] So SP6 had no alternative and in March 1997 he informed Edward Lee and the latter prepared a cash cheque for RM1 million.

[65] SP1, SP8, Fan Seng Chuan and Edward Lee had a meeting on 14 March 1997 in Edward Lee's office and after the meeting it was agreed that the cheque be issued. SP6 asked SP1 what to write in the accounts of the company and Edward Lee suggested that the payment be made and entered in the book of accounts as a payment to Mikawa Sdn. Bhd. SP6 did not know who owned Mikawa Sdn. Bhd. But he knew that it was a company which carried out earth works.

[66] A circular resolution was then issued out on 14 march 1997. He and SP8, Fan Seng Chuan signed it, P12. In the circular resolution it was stated that the RM1 million was a contribution for UMNO Selayang as per the suggestion of SP1 because they could not write that it was for Dato' Saidin. The cheque was written in the form of a cash cheque upon the request of SP1. The decision made at the meeting was not recorded in the minutes of the meeting. As they were afraid that the cash cheque would be banked into SP1's account or lost, they crossed the cheque.

[67] He signed the letter dated 15 March 1997, P13, stating that the RM1 million was given to the Selayang UMNO division. He handed over the letter, P13, to SP1. He did not hand over the cheque to SP1. It was Edward Lee who handed over the cheque to SP1.

[68] But it is significant that the learned SCJ did not observe in her grounds of judgment that SP1 had said he received the cheque together with the letter in an envelope.

[69] SP6 signed the letter of complaint to DSAI, D16, as a director of Nusantara. Soon after sending the letter to DSAI the ACA went to his company to investigate his complaint.

[70] In his cross-examination SP6, explained that the purpose of the meeting on 14 March 1997 between SP1, SP8, Fan Seng Chuan and himself in Edward Lee's office was to discuss whether the RM1 million ought to be paid to Dato' Saidin or not and the issue of the cheque. The company secretary, Catherine Tai was not present during the meeting. Edward Lee initially refused to issue the cheque because there was no connection between the new Nusantara and the payment of the RM1 million which according to SP1 was agreed to by Adiras. But SP1 objected saying that Dato' Saidin had pressured him many times to make the payment. SP1 then suggested that the RM1 million be paid to the Selayang UMNO division and not to an individual. So SP6 and Edward Lee and SP8, Fan Seng Chuan were forced to agree out of respect to SP1 who was a shareholder and their Bumiputra partner.

[71] SP6 then said that the company had to make a resolution and prepare a voucher. Since they had not received the receipt for the RM1 million from UMNO and in order to avoid problems with audit, he suggested that Mikawa's name be used in the payment voucher. The reason was because Mikawa was the sub-contractor engaged by Nusantara to carry out the earthworks for the project. SP6 also said that SP1 said that Dato' Saidin asked that the RM1 million be given in cash or in the form of an uncrossed cash cheque.

[72] They asked SP1 why Dato' Saidin wanted the money in the form of cash or a cash cheque and was told that the Selayang UMNO division had a special fund which was not audited and, therefore, Dato' Saidin asked that it be given in cash or in the form of a cash cheque.

[73] Although they knew that the RM1 million was to be given to the Selayang UMNO division they knew that the RM 1 million would be taken by Dato' Saidin. Nevertheless, they prepared the letter, P13, so that Dato' Saidin will know that the RM1 million was actually intended to be given to the Selayang UMNO division and not to him personally. P13 was prepared on 15 March 1997 by SP1's secretary, ("Mansur"), SP26, Mohd Mansor bin Mohd Sharif, in Nusantara's office.

[74] SP6 also said that the cheque was crossed because they did not want SP1 to put it into his own account.

[75] The letter of complaint dated 25 March 1998 to DSAI, D16, was drafted by a male Malay by the name of Panjang Kudin, at the lobby of the Concorde Hotel on 25 March 1998. He identified Muhamad Basir bin Nawabudin I.C No. 550310-02-5235 as Panjang Kudin ("Kudin"). SP6 got to know Kudin through SP1 but SP6 did not know what was the relationship between SP1 and Kudin. He did not know that Kudin had attended court that day in SP1's car.

[76] After SP6 had signed the original letter of complaint to DSAI, D16, he obtained a copy of it from Kudin who took the original. He did not know whether Kudin sent the original to DSAI. He identified the copy of the letter which was shown to him by Dato' Muhammad Shafee as the copy of the original letter which he had signed on 25 March 1998 and the learned SCJ allowed it to be marked as D16, being secondary evidence of the original letter of complaint.

[77] SP6 explained that the letter of complaint was sent to DSAI because he and Edward Lee had asked SP1 many times for the receipt for the cheque. This made SP1 angry and he told them they could make a complaint if they suspected that he had taken money. Since both of them knew that the cheque had been given to Dato' Saidin and there was no receipt issued for the cheque, the company decided to write the letter of complaint. SP6 also admitted that in actual fact they suspected that SP1 was also involved in taking the RM1 million because they did not get a receipt from SP1. Apart from that SP1 also asked them to pay another RM1 million to be given to Dato' Saidin.

[78] SP6 also said that when SP1 asked for the cash cheque for RM1 million to be issued he had said that a receipt would be issued for it. It was SP1 who suggested that the letter of complaint, D16, be sent to DSAI. The object was to obtain a receipt for the cheque. He disagreed that he wanted SP1 to be the Head of the Selayang UMNO division so that he could facilitate the project and that the object of the letter was to assist SP1 in unseating Dato' Saidin who was the incumbent Head of UMNO Selayang division.

[79] However, he admitted that he knew that the RM1 million was meant for Dato' Saidin and not for UMNO Selayang.

[80] He agreed that since there was no acknowledgment by Dato' Saidin on P13, P13 had become meaningless. He also agreed that the company did not trust SP1 and was afraid that SP1 would put the money into SP1's account. SP6 further said he would not be suprised if SP1 never gave the letter to Dato' Saidin.

[81] SP6 said he did not know that Bill Chin had asked for RM2 million compensation.

[82] SP6 said both he and Edward Lee gave their first statement, simultaneously, to the ACA but in different rooms in the Concorde Hotel. SP6 also saw SP1, briefly, in the same room in which SP6's statement was being recorded.

[83] In his re-examination, SP6 said that after recording his first statement in the Concorde Hotel, the ACA officers had recorded his subsequent statements at their office. He explained that when Bill Chin, SP10, mentioned about the political fund of 2 milion for Dato' Saidin at Taman Bidara, Bill Chin was still with Adiras and no one else mentioned that the 2 million was asked by Dato' Saidin as compensation for Bill Chin, Mohdi Maslan and SP11.

[84] He reiterated that SP1 had pressured him a few times saying that Dato' Saidin had asked for the 2 million because Bill Chin had promised him. After Nusantara gave the cheque for 1 million to SP1, SP1 told him that Dato' Saidin had asked for another 1 million as Nusantara had promised to give him 2 million altogether.

[85] He also explained that when SP1 asked that the cheque for 1 million be issued as a cash cheque upon Dato' Sadin's request, all the shareholders of Nusantara knew that the money was to be paid to Dato' Saidin although Bill Chin had asked for 2 million as political fund.

[86] SP1 informed SP6 at night that he (SP1) had handed over the cheque, P12 and the letter, P13, to Dato' Saidin on the same day. But right until the date of the hearing SP6 did not know that the cheque had been cashed. SP6 also said he knew that the 1 million had been credited into Dato' Saidin's account after he had signed the letter of complaint, D16, on 25 March 1998.

[87] They had issued the letter of complaint, D16, because SP1 had pressured them to come out with another 1 million to give to Dato' Saidin when they had yet to receive a receipt for the cheque, P12, for 1 million. SP1 posed the challenge to them that if they did not believe that the 1 million cheque had been given to Dato' Saidin they could write the letter of complaint, D16, to DSAI. So they did. When they wrote the letter of complaint, D16, they also proposed not to issue out another 1 million.

[88] The reason was because the 2 million was promised by Adiras. Since Adiras was no longer connected with Nusantara they had decided not to give the 2 million to Dato' Saidin. They only agreed to pay the 1 million in the name of the Selayang UMNO division to construct a building. They did this upon being pressured by SP1, their Malay partner. It was SP1 who told them that Dato' Saidin insisted that the cheque be issued as a cash cheque. SP1 said Dato' Saidin told him that the Selayang UMNO had a special fund to receive cash cheques. Upon being told of this, SP6 knew that the cheque was not for UMNO or Mikawa but for Dato' Saidin.

[89] He also explained that the reason why he agreed to sign the letter of complaint, D16, even though he knew that the cheque was not meant for UMNO or Mikawa was because SP1 pressured them to give another 1 million to Dato' Saidin.

Evidence Of SP7, Tan Hwa Nyee

[90] SP7 is an accountant by profession. He is attached to Mikawa Sdn. Bhd., a construction contractor. He testified that he was in charge of the financial matters of the company. As an

accountant he made sure that the book keeping and accounts are correct, true and fair and there are no discrepancies in the financial affairs of the company.

[91] In his cross-examination, he agreed that even though a cheque is a crossed cheque it has to go into an account. He also agreed that any accountant would know that. He further agreed that when a bank sees a cash cheque for RM1 million, eventhough it is crossed, the bank will still call the person who issued the cheque because it is normal for the bank to cover themselves by making a note of the call at the back of the cheque.

[92] He also agreed that D20 was a false document and whoever prepared the document was involved with some kind of dishonesty. He also agreed that if there was a donation, the name of the donee would be written in the cheque instead of the word "cash". He had not seen the word "cash" followed by the word "donation" in a case involving a donation. If it is a valid donation, it must be duly recorded in the company's accounts.

[93] In his re-examination, he explained that he has issued out cheques which were written 'cash' and then crossed, similar to P12, at the request of his sub-contractors who may wish to pay the cheques to their suppliers or sub-contractors to make sure he knows where the money goes.

Evidence Of SP8, Fan Seng Chuan

[94] SP8 is also an accountant. He is a director of Penaga Ventures Sdn. Bhd. He was invited by SP6, Frankie Lee, to be one of the directors of Nusantara because of his experience in land development. He was informed that there was a project in Selayang which was undertaken by Nusantara. He came to understand that there was a developer, Adiras, which had undertaken the job earlier but which was unable to fulfil its commitment to pay the RM5.6 million land premium to Majlis Daerah Gombak and some contribution. SP2, SP6 and Dato' Saidin proposed to Penaga Ventures Sdn. Bhd. to rescue the project and to fund the project because if the land premium could not be paid, the project would be withdrawn.

[95] SP8 said he was forced by SP6, Frankie Lee, to sign the circular resolution, P21, stating that the 1 million contribution was meant for the Selayang UMNO division. He asked SP6 for the receipt but SP6 told him the cheque was issued in the form of a cash cheque as it was meant to be paid for some political fund. He understood political fund to mean under table money or bribery money and it could be anything.

[96] He said he had been pestering SP6, Frankie Lee, for a receipt may be a week after he had signed the circular resolution because he had no control over the finance.

[97] He said that it was a normal banking practice to issue a crossed cash cheque when issuing a cash cheque. He explained that the reason was to protect themselves and to make sure that the courier does not abscond with the money and that the courier hands it over to the right party who is entitled to the cheque. However, if the money was intended to be paid to for eg, A, the cash cheque would not be crossed because A is the actual recipient of the cash cheque. The right party who receives a crossed cash cheque will have to bank it into an account. In this case it can be seen that the cheque was banked into an account.

[98] In his cross-examination, SP8 agreed that a chartered accountant who testifies in court that a crossed cash cheque need not be put into an account is not qualified to be as an accountant because what he says is not right. He also agreed that if a political donation is made, it must be reflected in the company's account. In this case he suspected that there was something dubious when he saw the crossed cash cheque after having signed the circular resolution stating that the money was a political donation to the Selayang UMNO division. The reason is because in view of the resolution, there was nothing wrong in giving the money to the Selayang UMNO division.

[99] He said he was not sure whether anyone including a politician can be given a commission out of arranging an honest business transaction.

[100] In his re-examination, he said he had no idea whether Nusantara was authorised to make a donation to any political party. He also said he would not be surprised if the RM1 million was not reflected in Nusantara's accounts even if there was no receipt for the RM1 million.

Evidence Of SP9, Edward Lee Hock Soon

[101] PW9 is the executive director of Bennes Engineering Bhd. which is in the construction business. He is also a director of Penaga Ventures Sdn. Bhd. He knows SP1 as the owner of Nusantara. SP1 was introduced to him by Bill Chin, SP10.

[102] PW9 said he signed the cheque, P12. The other signatory was SP2, Abu Zarin. The cheque was prepared by PW9's accounts clerk. After signing the cheque on 15 March 1997 which was the date written on the cheque he passed it to SP1 in the Pan Pacific Hotel, Kuala Lumpur at the Japanese Restaurant in the presence of Frankie Lee, PW6. He could not remember whether Frankie Lee, PW6 handed over an envelope to SP1.

[103] SP1 had requested for the cheque as payment. SP1 explained to him and Frankie Lee, SP6 that the cheque was a commitment made by Bill Chin. SP9 also said SP1 had been asking for the cheque for many, many months before he signed the cheque.

[104] In his cross-examination, he agreed that in signing the 1 million cheque he was mainly dependent on what SP1 had said. SP1 had told him that the 1 million was to complete the commitment made by Nusantara to Bill Chin previously. When he signed the cheque on 15 March 1997 he was not 100% sure for what purpose it was for although he knew that it was to go to Dato' Saidin. So he agreed that he was suspicious of SP1. He said he knew SP1 in 1996 but had no idea about his political background. He said his statement was recorded in 1998 which was more or less about a year after he had signed the cheque. One of his statements was recorded in one of the rooms in the Concorde Hotel. He confirmed that Frankie Lee, SP6 also had to give a statement to the ACA in another room at the Concorde Hotel.

[105] In his re-examination, he explained that he used the word commitment to mean a promise made by Bill Chin. SP1 did not use the word commitment. SP1 used the word political fund. It was presented to him and the others that the 1 million was to be paid to Dato' Saidin failing which the development plan of their Selayang Project would not be approved because Dato' Saidin was a member of the Selangor State EXCO.

A **Evidence Of SP10, Bill Chin Sooh Howe @ Chin Kok Howe**

[106] SP10 is the executive director of Delta Price Sdn Bhd which is a supplier of building materials. He is also the Executive Chairman of Adiras which was incorporated in 1994. In his
B examination-in-chief, he said that the directors of Adiras are himself, Mdm Ho Wan Ying and Frankie Lee Kah Hoay, SP6. When he took over Adiras the nature of the business of Adiras was property development.

C **[107]** He was introduced to SP1 in 1995 when he, SP6, Frankie Lee and SP2, Abu Zarin and SP8, Fan Seng Chuan were talking about some project. It was Abu Zarin, SP2, who had introduced him to SP1. SP1 was one of the directors of Nusantara at that time.

D **[108]** He discussed with SP1 about getting the land for a project which was called Selayang Development. Subsequently Adiras entered into a joint venture agreement with Nusantara. Under the joint venture agreement, P3, it was Nusantara's responsibility to get the alienation of the land and the approval of the government
E to develop the land. The land must be able to be charged as a collateral for purposes of obtaining financing. Once that is done, it becomes the responsibility of Adiras to undertake the development of the land. This includes the removal of the nine bungalows on the land to another site. The financial matters were also the
F responsibility of Adiras.

[109] In early 1995, at a dinner, SP10 was introduced to Dato' Saidin by one of the directors of Nusantara. At that time SP10 knew that Dato' Saidin was a State Assemblyman and the division
G head of the Selayang UMNO division. But he was not sure whether Dato' Saidin was in the Selangor State EXCO.

[110] About one month subsequent to his first meeting with Dato' Saidin, SP10 attended another dinner together with SP1, SP2, SP11, SP6 and Dato' Saidin. At the second dinner, they
H asked Dato' Saidin whether the land could be alienated to Nusantara and Dato' Saidin said everyone can apply for the land but it is up to the State EXCO to approve the application.

[111] After the second dinner, SP10 met Dato' Saidin about four
I times in Dato' Saidin's office to ask what was the status of Nusantara's land application. On one of the four occasions, Dato'

Saidin asked whether Nusantara can contribute to the UMNO fund through him a sum of 2 million if the project is successful. SP10 told Dato' Saidin he will convey the suggestion to the Nusantara directors. At that time SP10 did not then think that Nusantara's land application was approved yet.

[112] During one of his casual meetings with the directors of Nusantara, he told SP2, SP11 and SP6, another director of Adiras, that Dato' Saidin had suggested that if the land is alienated to Nusantara whether Nusantara can consider contributing 2 million to the UMNO fund. SP2, SP11 and SP6 and himself agreed in principle that if the project is successful and the company is making money they could agree to the suggestion and that the 2 million is to come from the profits. But SP10 did not inform SP1 about the request by Dato' Saidin.

[113] Subsequently, he received a letter from Nusantara that Nusantara's application was approved. He also received the letter of approval dated 4 November 1995, P8, from Nusantara.

[114] He then applied to Maybank for a 60 million loan which was not approved. He then applied to MBSB for a 48 million loan which was approved in July 1996.

[115] But he did not understand why in August 1996 *vide* a letter dated 13 August 1996, P9, (the "termination letter") Nusantara terminated the joint venture agreement, P3, with Adiras.

[116] Upon receipt of the termination letter, he wrote to Nusantara to object to the termination of the joint venture agreement, P3, after he had obtained the approval of the 48 million loan from MBSB. He believed Nusantara's termination of the joint venture agreement was unlawful because it is stated in the joint venture agreement that if there is any disagreement, it should be settled amicably or by arbitration but that was not done.

[117] Nusantara did not respond to his letter and the time lapsed and the loan expired. So he told SP1 that Nusantara must compensate him for the wrongful termination of the joint venture agreement. He told this to SP1 through the telephone because he was unable to meet SP1 and so he was unable to even talk to SP1.

[118] One day he approached Dato' Saidin for help because Dato' Saidin had the power. Dato' Saidin said 'Yes' to his demand for compensation. After that Dato' Saidin approached SP1 and SP1 agreed in principle to compensate him. One night SP1 spoke to him on the telephone. SP1 said he was agreeable to pay him compensation of 1.5 or 2 million and that Nusantara or SP1 would buy over Adiras's share so that Nusantara can do the development of the land themselves.

[119] There was a draft agreement prepared by his solicitor, Mr. Gurubachan Singh Johal s/o Amar Singh, SD6, sometime in 1996 in which Nusantara agreed to compensate him a sum of 1.5 million to buy over Adiras's shares for the wrongful termination of the joint venture agreement. But until the date that he testified in court during the trial of Dato' Saidin Nusantara had not bought over the shares of Adiras yet, he was also never compensated and he did not know what happened to the project.

[120] After Adiras was terminated by Nusantara, he heard Edward Lee took over from Adiras as the partner of Nusantara and also joined Nusantara. He said SP9, Edward Lee was supposed to be his contractor and his company, Delta Price Sdn. Bhd., used to sell building materials to Edward Lee's company, Bennes Engineering Bhd. He thinks that SP1 is making use of Edward Lee.

[121] After speaking to SP1 over the telephone about the 1.5 or 2 million compensation he never saw SP1 again. He did not know whether the 2 million suggested by Dato' Saidin for UMNO's fund was ever paid by Nusantara and he also did not know whether UMNO fund or political fund meant the same thing. He explained that he had approached Dato' Saidin for help and if Dato' Sadin could help, the 2 million would be paid through Dato' Saidin. Dato' Saidin had agreed to help and if SP1 agreed to pay the 2 million it would be paid through Dato' Saidin. He also explained that his 2 million claim against Nusantara for the wrongful termination of the joint venture agreement was a separate matter. Up-to-date has not pursued his 2 million claim against Nusantara in any civil suit.

[122] He had prepared an estimate of the respective payments to be made if the project is successful, P22N, and against Dato' Saidin's name he wrote 2 million. He explained that he did that

because he always referred to Dato' Saidin as UMNO fund and to him UMNO fund means Dato' Saidin. He denied that Dato' Saidin had any share in his company, Delta Price Sdn. Bhd., or in the Adiras's share of the joint venture agreement with Nusantara. He denied that he had a meeting alone with Dato' Saidin at the Equatorial Hotel and that he had requested SP6, Frankie Lee, SP2, SP11 and SP1 to leave him alone together with Dato' Saidin at a private room in the Equatorial Hotel.

[123] In his cross-examination, SP10 said after the joint venture agreement, P3, was signed between Nusantara and Adiras, there was a supplementary joint venture agreement dated 9 November 1995 together with a power of attorney executed a day later which identified the land for the Selayang Business Park. It was after signing P3 that he, SP1 and the other directors decided to meet Dato' Saidin. At the time he met Dato' Saidin he was told that Dato' Saidin was a State Assemblyman.

[124] Dato' Saidin did not make any suggestion of the payment of any under counter money to himself. He also reiterated that Dato' Saidin never solicited any money from him or Adiras for himself. He categorically said that Dato' Saidin never asked for 2 million; 1 million for himself and 1 million for Tan Sri Mohd Taib (SP18). He also agreed with the suggestion of Dato' Muhammad Shafee that it would be totally untrue if anyone were to suggest in the court that Dato' Saidin asked for money for himself and for the Menteri Besar.

[125] He reiterated that Dato' Saidin did not solicit from him or Nusantara to give UMNO 2 million. He explained that there was no reason for Adiras to promise to give the 2 million because the alienation of the land was to Nusantara and not to Adiras.

[126] He insisted that what he said in court was what he had been telling the ACA. He also insisted that what he said in court is consistent with the statement he had given to the ACA. During the ACA's investigation he wanted to tell the ACA the truth but the ACA more or less wanted him to incriminate Dato' Saidin.

[127] Before his statement as a witness was taken by the ACA, the ACA interrogated him for several days and the interrogation went on until late at night and on one occasion until 1.13am in the morning. The ACA insisted that he gave similar answers as

given by the others. A ruler was used by an officer of the ACA, namely, Encik Jamidan, SP28, to physically threaten him. He also witnessed a similar intimidation by Encik Jamidan, SP28, towards his counsel, Encik Gurubacan Singh Johal s/o Amar Singh, SD6, when the former threatened to throw a cup at the latter.

[128] He reiterated that the termination of the joint venture agreement by Nusantara *vide* the letter of termination, P9, was unjustified because he never misrepresented to Nusantara that he was a developer when the joint venture agreement was drawn up and the joint venture agreement did not mention that he must be a developer.

[129] He reiterated that the land was alienated in November and in the joint venture agreement it was agreed that Nusantara must get the approval for the land alienation and also the development plan. He reiterated that the bank loan was approved in July 1996 which was three weeks before he got the termination letter and Nusantara knew that he had got the loan already. He reiterated that he had no clue why Adiras was terminated and even if Nusantara wanted to terminate they must do so in accordance with the joint venture agreement. He reiterated that Adiras wrote a letter to Nusantara objecting to the termination and this was followed by a letter from his solicitor.

[130] He was able to produce the original supplementary agreement, D23A and the original power of attorney, D23B. He also produced a copy of the undated draft copy of the agreement for the sale and purchase of Adiras's shares by Nusantara, D26. There is a possibility that Adiras may sue Nusantara in the future if the time is appropriate.

[131] He reiterated that he had approached Dato' Saidin for assistance regarding compensation for Adiras for wrongful termination of Adiras because Dato' Saidin and SP1 were good friends and also since Dato' Saidin was a senior person and a respectable person and SP1 was one of the UMNO members in Selayang. He was expecting at least 1.5 million in compensation and if Dato' Saidin could negotiate and get the compensation, Dato' Saidin could receive the money on his behalf and give it to him later.

[132] He was not aware that Dato' Saidin had paid RM200,000 to SP11 because SP11 lost his job in Nusantara. His last contact with Dato' Saidin was sometime at the end of 1996 about compensation for Adiras from Nusantara and the next time he saw Dato' Saidin was in the court. Since sending the termination letter to SP1, SP1 had avoided him. Then all of a sudden SP1 called him at night and asked him to go to the Concorde Hotel. He did not go because he felt apprehensive. Two days later the ACA went to his house but he was not at home. He was informed by his wife and son that SP1 and a few people had gone to his house about an hour before the ACA officers went to his house.

[133] There was never a one to one meeting between himself and Dato' Saidin in the Equatorial Hotel or in any other hotel where he had asked everyone to leave him alone with Dato' Saidin. He also never informed anyone including SP1, SP2, SP6 or SP11 that Dato' Saidin had actually asked for 2 million political fund for UMNO as a condition for him to get approval for the land.

[134] In his re-examination he reiterated that he felt threatened during the ACA's investigation. Each time he was interrogated by the ACA for the purpose of taking his statement, the officer of the ACA would refuse to take it in the way which was said by him and the officer of the ACA would insist that he must say the same thing as the others have said. When he refused to comply with the directions of the ACA officers, they threatened to lock him up.

[135] He explained that he felt funny when SP1 suddenly wanted him to go to the Concorde Hotel because prior to that whenever he called to speak to SP1 over the telephone, SP1 was never available and SP1 never returned his calls. He was not fearful of Dato' Saidin and he never informed an ACA officer that he was fearful of Dato' Saidin.

[136] He reiterated that he only had one meeting cum dinner with Dato' Saidin and the other directors and that he never had any meeting with Dato' Saidin at the Equatorial Hotel without the other directors being present. He reiterated that the 2 million suggested by Dato' Saidin was in the event the project is successful and it must be with the agreement of Nusantara because Adiras was only a joint venture partner with Nusantara.

A He said that when Dato' Saidin made the suggestion he did not say 'No' and he told Dato' Saidin he would convey the message to Nusantara.

[137] He explained that in principle the director of Nusantara
B agreed to pay to Dato' Saidin the 2 million but he never conveyed this to Dato' Saidin because he expected them to convey the message themselves to Dato' Saidin.

[138] He reiterated that Encik Mohd Jamidan bin Abdullah
C ("Encik Jamidan"), SP28, used a ruler to hit him each time Encik Jamidan was angry with the statement given by him and he felt humiliated by Encik Jamidan's treatment of him. Encik Jamidan also threatened to lock him up. He also reiterated that when Encik Jamidan was interrogating him, Encik Jamidan also threatened to
D throw a saucer at his counsel, Encik Gurubachan Singh Johal s/o Amar Singh, SD7.

On one occasion when his counsel, Encik Gurubachan Singh Johal s/o Amar Singh, DW6, asked Encik Jamidan why the interrogation was taking so long, Encik Jamidan wanted to throw a coffee cup
E at his counsel.

[139] He reiterated that Dato' Saidin suggested 2 million UMNO fund in the event the project is successful and the 2 million was supposed to be paid by Nusantara because the land matter is
F Nusantara's responsibility whilst anything to do with development is Adiras's responsibility.

[140] He explained that Adiras had asked for two extensions to pay the land premium of 5.6 million and the second extension
G which was given was up until July. He also explained that Adiras had no problem paying the premium for the land because the approval of the loan from MBSB came in July and it would take only a matter of days for him to increase the paid up capital of Adiras from RM500,000 to RM600,000. He was able to produce
H the letter of offer of the loan from MBSB dated 25 July 1996. He had also accepted the offer. He reiterated that he was a contractor and he explained that as a contractor he can be a developer without any problem because they have consultants to run the show.

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[141] When he was referred to P22N which had the words "2 million" written next to Dato' Saidin's name, he explained that Dato' Saidin must have proposed the 2 million before May and that he had drawn up the estimate in the event Nusantara is interested to sell the company to Adiras and the money which he mentioned in the estimate, P22N, is the buying-over of the project ie the new company would have to pay the 2 million as contribution to UMNO. But he did not know what the other directors told Dato' Saidin about the 2 million.

[142] He also explained that SP6, Frankie Lee has 4% in Adiras and when he crossed over to Nusantara, his 4% in Adiras remains with Adiras. Concerning his demand for compensation from Nusantara for the wrongful termination of the joint venture agreement he told Dato' Saidin that Dato' Saidin could keep the money until the whole thing was settled.

Evidence Of SP11, Mohd Kalili bin Abdullah

[143] SP11 was a director of Nusantara. He never received a director's allowance from Nusantara. His evidence on the issue whether in the month of March 1995, at a dinner cum meeting at the Chinese restaurant in the Equatorial Hotel, Bill Chin was left alone with Dato' Saidin in a room is also similar to the evidence of SP1, SP2 and SP6.

[144] SP11 said he was a director of Nusantara from 1994 to 1996 together with SP1, SP2 and Mohdi Mazlan. His evidence concerning Nusantara's joint venture agreement with Adiras for the project called Selayang Business Park, and approval of Nusantara's subsequent application by the Selangor State EXCO corresponds to SP1's, SP2's, SP6's and SP10's evidence.

[145] SP11 said that he was the one who drafted and signed the letter, dated 24 September 1995, P28, which was addressed to Dato' Saidin to ask for his assistance to approach the Menteri Besar to obtain the approval for Nusantara's application for the land. He personally handed over the letter, P28, to Dato' Saidin together with Mohdi Mazlan. At that time he was a member of the Selayang UMNO division. Dato' Saidin was the head of the Selayang UMNO division and also the State Assemblyman for the Paya Jaras constituency.

[146] In September or October 1995, in Dato' Saidin's office in Paya Jaras, Dato' Saidin handed over to him, the State EXCO's letter of approval dated 4 November 1995, P8, from the Gombak district land office to him. He in turn handed over P8 to SP1 who was the Chairman of Nusantara at that time.

[147] Subsequently, Nusantara terminated the joint venture agreement with Adiras, but he did not know the reason for the termination. It was SP1 who gave the unsigned letter of termination, P9, to him at SP1's house or SP1's office (he has forgotten the exact location). It was also SP1 who instructed him to sign the letter. So he signed it. He did not comprehend fully the contents of the letter because he did not read it fully or carefully before signing it as the letter was written in English.

[148] In October 1996 he was directed to sign the transfer form for his exit as a director together with all the other directors, namely, SP1, SP2 and Mohdi Mazlan from Nusantara. SP1 told him that the reason was because they did not want to be guarantors for loans to be taken for the project. He did not ask for any compensation from Nusantara in respect of his termination.

[149] SP2 informed him that there was a company, namely, Penaga Ventures Sdn. Bhd. which was interested to have a joint venture with Nusantara.

[150] SP11 explained that when he joined Nusantara as a director he was given 1% of the shareholding by SP1 although he did not contribute any capital. The capital was provided by SP1.

[151] After he was terminated by Nusantara he formed his own company, namely, Laluan Angsana at the end of October 1996. It was involved in the business of public transportation. It had a permit to operate limousines from hotels.

[152] In January 1997 he approached Dato' Saidin for assistance to help his partner, Hussin bin Mohd Johari ("Hussin"), SP16, who was not paid his salary by SP1 even though it was already two to three days to Hari Raya Puasa.

[153] In June 1997, he, Hussin and another partner, Choo Ah Kai from Laluan Angsana again approached Dato' Saidin for help because Choo Ah Kai was unsuccessful in his efforts to obtain a bank loan and the company was facing financial problems with many unpaid debts.

[154] Dato' Saidin asked them to discuss the matter with the Board of Directors. SP11 and Hussin then informed Dato' Saidin that they intended to terminate Choo Ah Kai and they showed to Dato' Saidin a letter offering him 40% of the company's shares which were worth about RM200,000. Dato' Saidin agreed to help their company's operation. He paid a sum of RM200,000 *vide* three Sime Bank Bhd's cheques for a sum of RM158,000 and the balance in cash in stages.

[155] In his cross-examination he said that he never received a director's allowance from Nusantara. But he received a political allowance from SP1, probably from Nusantara for assisting SP1 in his political work and also attending to the affairs of Nusantara. The allowance is paid to him in cash and never by cheque. Initially the allowance was paid on a monthly basis. Subsequently, the payment of the allowance to him by SP1 became uncertain.

[156] The Selayang Business Park project was the brainchild of SP2, Abu Zarin. When SP2 was discussing the matter with Bill Chin, he (SP11) showed his interest in the project. At that time they had not informed SP1 of the project yet. He had yet to be paid any compensation by Nusantara. He holds 50% of the shares in Laluan Angsana of which 20% is as the nominee of Dato' Saidin. Encik Hussin bin Johari's son, Encik Shaharul holds the remaining 50% out of which 20% is also as the nominee of Dato' Saidin. He admitted that there was no trust deed in respect of the 40% shares which he and Encik Shaharul were holding on behalf of Dato' Saidin. He also agreed that there was no document stating that his company, Laluan Angsana, owed Dato' Saidin a sum of RM200,000. His statement was recorded by the ACA one week after the UMNO Selayang delegates meeting was held on 29 March 1998. He denied that he had met Dato' Saidin in order to get the latter's assistance to act as an intermediary to obtain compensation from SP1 for his termination from Nusantara and also for the discontinuance of Hussin bin Johari's allowance by SP1. He also denied that Dato' Saidin had also told him that he was trying to get compensation for Bill Chin.

[157] He reiterated that he still remembered having attended the dinner at the Equatorial Hotel together with the others and that after the dinner he entered the private room in which he saw Bill Chin, Dato' Saidin, Mohdi Mazlan, SP6, Frankie Lee, SP2, Abu Zarin and SP1 having a meeting but he left to go to the wash room. Upon his return from the wash room, he sat outside the

corridor. He saw that SP2, Abu Zarin, SP1, Mohdi Mazlan and Frankie Lee were outside. He did not see Bill Chin and Dato' Saidin so he thought they were still in the private room.

[158] He reiterated that he still remembered the second dinner at the Park Royal Hotel which he attended. He explained that he did not read fully the contents of the letter of termination because he was not proficient in English and SP1 had directed him to sign it quickly so he did not have sufficient time to read it fully. It did not occur to him why SP1 himself did not want to sign the letter of termination.

[159] In his re-examination, he explained that Hussin did not work for Nusantara. Hussin merely performed work for SP1's political career. Usually SP1 would pay Hussin his allowance early during the fasting month instead of waiting until Hari Raya to pay Hussin. After he was terminated by Nusantara he took over the office of Nusantara which was a double storey building originally rented and paid for by SP1.

Evidence Of SP15, Zulkepli bin Ahmad

[160] SP15 was the Secretary of the State EXCO at the material time. In his cross-examination, he said that Dato' Saidin had met him at the office of the State Legislative Assembly to ask his assistance to refer Nusantara's application to the Menteri Besar for it to be tabled before the State EXCO. At that time Dato' Saidin was the State Assemblyman for the Paya Jaras constituency. He explained that it was the normal practice for the State Assemblyman concerned to see him to expedite the approval of the State EXCO for land applications of their constituent members. In the instant case Dato' Saidin met him only once in connection with Nusantara's application.

[161] In his re-examination, he explained that Nusantara's application was processed on a first come first serve basis and that it was not processed on an expedited basis.

Evidence Of SP16, Hussin

[162] SP16's evidence on the issue of him going to see Dato' Saidin to obtain financial assistance because he was terminated by SP1 and was not paid his monthly allowance even though Hari Raya Puasa was approaching is similar to that of SP11. He said

that Dato' Saidin gave him RM500 on that occasion. However, on the issue whether Dato' Saidin had agreed to accept the 40% shareholding offered by Laluan Angsana, contained in the letter of offer, P29, SP16's evidence differed from that of SP11. SP16 said that Dato' Saidin had helped Laluan Angsana financially without accepting the 40% share offer by Laluan Angsana. SP16 explained that he has never worked with Nusantara and that he only worked with SP1 under SP1's auditing firm, namely, Hanafiah Noordin & Associates.

Evidence Of SP18, Tan Sri Muhamad bin Muhamad Taib

[163] In his examination-in-chief, SP18, said he was the Menteri Besar of Selangor at the material time. By virtue of that post he was also the Chairman of the State EXCO. The duties of the EXCO included the approving of applications for land in the State of Selangor.

[164] He explained that the basis for approving or rejecting an application for land is the feedback from the relevant departments such as the Director of the Lands and Mines, Department concerning the technical aspects and the urgency of the project to be developed on the land. The feedback is contained in the form of an EXCO paper and is circulated to every member of the EXCO.

[165] He confirmed that P37(1) was the minutes of the EXCO meeting on 4 October 1995 and that he was the Chairman of the EXCO meeting on that date and the EXO members were as stated therein. He also confirmed that the decision of the EXCO which was made on that date was to alienate the land to Nusantara and to reject the two other applications.

[166] He also said that Dato' Saidin was no longer a member of the EXCO on that date. He was only an ordinary State Assemblyman for the Selayang division, to wit, Paya Jaras. Dato' Saidin was also a member of several committees including the District Development Committee, District Planning Committee and District Land Committee. Nusantara's application was not discussed in those Committees. It was referred straight to the Director of Lands and Mines ("DLM") who had endorsed it for onward transmission to the State EXCO for the latter's decision. He explained that once approved by the EXCO the DLM will

send it down to the district land Administrator who will then inform the applicant the result of his application and the conditions for the approval.

[167] All the State Assemblymen including Dato' Saidin have unlimited access to him. Dato' Saidin may have seen him about Nusantara's application because it was the usual practice for the State Assemblymen to see him to discuss about the development in their respective constituency and to expedite the approval for the projects in their constituency based on their urgency and importance. There is nothing wrong for Dato' Saidin to do that in his capacity as a State Assemblymen. As far as he could recall Dato' Saidin did not see him to ask him to approve Nusantara's application.

[168] He did not ask Dato' Saidin to ask for "habuan 1 juta" for the approval of Nusantara's project from anyone. He was also the Chairman of the State UMNO. He did not authorise Dato' Saidin to obtain contributions for the Selangor UMNO fund. If any division receives a contribution it must be channelled to the State UMNO fund which has its own Chairman. Dato' Saidin did not inform him that he had received a contribution from Nusantara for the Selangor UMNO fund.

[169] In his cross-examination, he said that it was possible that Dato' Saidin had informed him about Nusantara's application although he could not recall that Dato' Saidin had informed him about the matter. He said that the District Officer's quarters were in a very bad condition in 1995 and were unsuitable for use by the District Officer.

[170] Out of the three applications, Ratar Bumi's application had the least merits, whilst Nusantara's application had the most merits. The reasons were because Nusantara's application was more beneficial to the State compared to the application of Shah Alam Properties. The amout of money which Nusantara was going to invest in the project was also more than that of Shah Alam Properties. The EXCO also took into consideration that it had approved an earlier application of Shah Alam Properties to develop Rawang. So based on the feedback which showed that Nusantara's proposal was better than that of Shah Alam Properties, the EXCO decided to approve Nusantara's application.

[171] Since Dato' Saidin was not a member of the State EXCO he need not disclose his interest in Nusantara to the EXCO. As an ordinary State Assemblyman who is not a member of the EXCO Dato' Saidin can engage in business. If he receives a commission in the course of his business, he is allowed to keep the commission for himself because there is no prohibition in that regard. SP18 was able to recall that something similar happened in the past when he was informed by a State Assemblyman that he received a commission in the course of his business although it was not necessary for the State Assemblyman concerned to inform him.

[172] As a chartered accountant SP1 ought to know the manner in which a political fund is channelled to UMNO. The cheque must be channelled to the Selangor Liaison Body. According to his knowledge, no cash cheque has ever been given to the Selangor UMNO. Political donations to UMNO are not illegal or unlawful. They can be made openly and there is no necessity to conceal such donations.

[173] He agreed that on 28 March 1998 he attended the meeting for the UMNO divisional elections in Selayang. He also agreed that one week before that date the situation in Selayang was very tense because there was stiff competition between two contestants, namely, SP1, and one Suhaimi to wrest the division head's post from Dato' Saidin who was the incumbent at that time. He also agreed that from March to April 1998 his own situation in politics was also in a turmoil. He heard many stories concerning himself. The State Assemblymen were also literally lining up to see him in his capacity as the Menteri Besar to ask for approval for projects in their constituencies. But Dato' Saidin only went to see him, probably, on only one occasion to inform him about a project. At that time it did not cross his mind that Dato' Saidin had any ulterior motive because the EXCO paper concerning Nusantara's application was a straightforward paper. It was supported by the land office and the DLM. There was also a necessity for the project and the project would be built by the company itself. Furthermore, the State Government did not have to come out with any money for the project. So whether Dato' Saidin saw him or not, there was no problem with Nusantara's application.

[174] In his re-examination, he reiterated that it was not an offence for a State Assemblyman to engage in business. He explained that this means that a State Assemblyman can himself set up a company and apply for a project and lobby him, to wit, see him (SP18) in order to ask him to approve the project even though the State Assemblyman will receive a 5 million commission for the approval of the project. The State Assemblyman can also set up a company and become a developer. In his opinion even in the case where the State Assemblyman does not own a company and engage in business it is not an offence for the State Assemblyman to receive a commission if the project is approved by the State EXCO.

[175] Concerning contributions to UMNO it was discussed at an UMNO meeting that the procedure is that all contributions whether under the name "political fund" or under any other name are to be sent to the State UMNO which has a Chairman and a treasurer and a receipt will be, duly, issued to the contributor.

Evidence Of SP23, Ruslan bin Baharin

[176] In his examination-in-chief, SP23 said that he was the treasurer for the Selayang UMNO division for the years 1995 to 1998. The head was Dato' Saidin.

[177] His duties included looking after the accounts for the division and also the division's bank account. At the material time he was not told that Nusantara had made a political contribution to the Selayang UMNO division. He has heard of Nusantara. He knows SP1 as the Deputy head of the Selayang division. Dato' Saidin never informed him of Nusantara's RM1 million contribution to the Selayang UMNO division.

[178] In his cross-examination, he said the Selayang UMNO division holds monthly meetings once or twice a month. After the meetings, those present would still stick around until the next morning. SP1 attended most of the monthly meetings in 1998.

[179] SP1 has never enquired in any of the monthly meetings about money which was given to the Selayang UMNO division's fund. SP1 also never asked for a receipt to be issued for money which he had given to the Selayang UMNO division.

[180] His evidence concerning the procedure for the giving of contributions to UMNO was similar to that of SP18. According to SP23, all contributions which are given to the Selayang UMNO division had to be channelled first to the State Liaison Committee and a receipt will be issued. As the deputy head of the Selayang UMNO division and also an accountant, SP1 would have known about the procedure.

[181] The head of the Selayang UMNO division does not have a special room. He shares a room with the other committee members.

[182] He had never heard SP1 quarrelling with Dato' Saidin concerning a receipt for 2 million. If there was such a quarrel the other committee members would surely have heard about the quarrel.

[183] It is not true that the Selayang UMNO division has a secret fund, otherwise he would have heard about it.

[184] In his re-examination, he said that during the duration of his tenure as the treasurer of the Selayang UMNO division he has never received any political contribution. The treasurer's report is a detailed one concerning all monies going in and coming out of the account of the division. If there are any items which are left out such as the political contribution it would be raised at the next meeting. But such a thing was never raised at any of the meetings.

Evidence Of SP24, Dato' Abdul Rahim bin Osman

[185] In his examination-in-chief, he said he was not an UMNO member but he knows SP1 for the past 25 years. When he first met SP1, SP1 was the senior partner in Ernst & Whiney.

[186] He knew Dato' Saidin for the past 30 years. So he knew Dato' Saidin even before he got to know SP1. He was the one who had introduced SP1 to Dato' Saidin and who had suggested to the latter to make SP1 the treasurer of the Selayang UMNO division because of SP1's suitability for the post since he was an accountant by profession.

[187] On 23 March 1998 in accordance with the directions of SP1 he met Dato' Saidin and conveyed to Dato' Saidin, SP1's message that SP1 was going to contest against Dato' Saidin for the Selayang UMNO division head's post of which Dato' Saidin was the incumbent. Dato' Saidin told him that he would be defending his post.

[188] SP24 did not threaten Dato' Saidin with the RM 1 million cheque. As instructed by SP1 he merely showed a photostat copy of the cheque to Dato' Saidin and asked Dato' Saidin whether it was his cheque and Dato' Saidin said 'Yes'. Dato' Saidin also said it was not an embezzlement but a business deal between himself and SP1. He did not ask Dato' Saidin what was the nature of the business deal. Dato' Saidin appeared happy. He did not look nervous or scared.

[189] SP24 admitted that he did not know the background of the cheque. So he took back the copy of the cheque, went to the Concorde Hotel at 4pm and returned it to SP1. He did not remember the details of the copy of the cheque, to wit, whether it was a cash cheque or whether it was crossed. He saw RM1 million and the name of Nusantara on the copy of the cheque. When he was shown the cheque, P12, he was able to recognise it.

[190] In his cross-examination, he reiterated that he went to see Dato' Saidin on 24 March 1998 as instructed by SP1 to confront Dato' Saidin with the copy of the cheque. He explained that he was given the copy of the cheque by SP1 a day earlier, to wit, on 23 March 1998. When SP1 gave it to him he saw that there were many similar copies of the cheque on SP1's table. SP1 told him to show it to Dato' Saidin and that Dato' Saidin will understand. He got the impression from SP1 that if Dato' Saidin did not withdraw from the contest for the Selayang UMNO division head's post in order to give way to SP1 who is an accountant, it will be disastrous for Dato' Saidin because the cheque will be used against Dato' Saidin.

[191] He said he brought along with him two of his friends as his witnesses, namely, Mohd Zaki Abdullah and Zamri Rahmat, when he went to see SP1 and SP1 gave him his instructions to confront Dato' Saidin in a friendly manner with the copy of the cheque. His two friends also followed him to the coffee house in

the Templer Park Golf Club when he confronted Dato' Saidin with the cheque. The statements of all three of them have been recorded by the ACA in SP1's study in his house.

[192] He agreed that if SP1 said he did not give those instructions to him SP1 would not be telling the truth. He further said that SP1 rented a room in the Concorde Hotel for his own use. But there were also two or three ACA officers who were also in the same room. He got to know Kudin when SP1 was contesting for the division head's post but he did not know the nature of SP1's relationship with Kudin. Based on what he saw Kudin appeared to him to be a friend of SP1. He also saw Kudin giving ideas to SP1. He identified Mohd Bashir Nawakudin as Kudin.

[193] In his re-examination, he confirmed that the contents of the police report which was lodged against him by Dato' Saidin, IDD24 were true with one exception, to wit, he did not threaten Dato' Saidin. As instructed by SP1 he merely told Dato' Saidin in a polite manner that if Dato' Saidin did not withdraw from the contest, SP1 will report the case concerning the cheque to the ACA. Dato' Saidin's reply was "kalau hendak lapor pada Badan Pencegah Rasuah, laporlah ini adalah business deal" in the national language. At that time Mohd Zaki Abdullah and Zamri Rahmat could not hear what they were talking about because they were at a distance of about 100 metres from the two of them.

[194] The learned SCJ erred when she did not appreciate that Bill Chin's evidence was credible and consistent throughout, that he has categorically said that Dato' Saidin did not solicit a bribe of RM1 million for himself and RM1 million for the Menteri Besar and that the 2 million which he wrote against Dato' Saidin's name in the estimate was only a suggestion from Dato' Saidin in his capacity as the division head of Selayang UMNO that in the event the project is successful and produces profits whether Nusantara can make a 2 million donation to the UMNO fund. More importantly Bill Chin said that he was threatened with arrest and also hit on his hand by the ACA officers with a ruler because he did not give a statement consistent with that given by the other witnesses that Dato' Saidin had solicited for himself 1 million and another 1 million for the Menteri Besar. Had the learned SCJ not erred she would have ruled at the close of the prosecution case

A that the defence had succeeded in raising a reasonable doubt in the prosecution case itself that the cheque was given willingly to Dato' Saidin as a commission by SP1 for the acts done by Dato' Saidin as mentioned earlier and received lawfully and not corruptly as alleged by SP1 as stated in the charge against Dato' Saidin.

B

[195] The learned SCJ erred when she failed to appreciate the following evidence given by the prosecution witnesses:

(1) SP1 initially said it was Bill Chin who told him that Dato' Saidin had asked him for 1 million for himself and another 1 C million for the Menteri Besar in order to obtain the approval of the State EXCO for Nusantara's application but he told Bill Chin that was the responsibility of Adiras;

(2) Subsequently he said on 2 January 1997, Dato' Saidin D personally asked him when was he going to pay the 2 million and when SP1 told him Nusantara had terminated its joint venture agreement with Adiras and entered into a new joint venture agreement with new shareholders who may be persuaded to give the 2 million to UMNO for its own E building Dato' Saidin said "No! No! I have an agreement with Bill Chin for 2 million. 1 million due to me and 1 million for the Menteri Besar. The 1 million due to me can be deferred but the 1 million due to Menteri Besar must be paid now.";

F

(3) SP1 said they had a heated argument in Dato' Saidin's office in Selayang UMNO and Dato' Saidin said he wanted his money in cash but after some argument said he did not mind taking a cash cheque;

G

(4) So SP1 asked SP9 to issue a cash cheque based on Dato' Saidin's request and this was done but it was SP9 who crossed the cheque as a precaution and he telephoned Dato' Saidin on the night of 15 March 1997 and he went to Dato' Saidin and gave him the cheque in an envelope H together with the letter, P13;

(5) If what SP1 said about Dato' Saidin's demand about the first 1 million is true then the prosecution would have charged Dato' Saidin for cheating because Dato' Saidin I banked the cheque into his account and the Menteri Besar

said he did not solicit for the 1 million and there is no evidence that the 1 million had gone into the Menteri Besar's account but that was not done;

(6) Similarly if what SP1 said about Dato' Saidin's demand is true then the prosecution would have charged Dato' Saidin for two charges, to wit, one charge for soliciting corruptly the 1 million for himself and another 1 million for the Menteri Besar and a second charge for corruptly receiving the 1 million but that was not done;

(7) But SP23 another neutral witness, like SP24, said that there is no such thing as a secret fund for the Selayang UMNO division, that there is no special room for the division head in the Selayang UMNO division and that if there was a heated argument between SP1 and Dato' Saidin concerning the receipt for the 2 million at the Selayang UMNO division he and the other committee members would have heard about it;

(8) SP2 has also said that the 2 million mentioned by Bill Chin for the political fund is to be paid by Penaga Ventures Sdn Bhd only after the project was implemented;

(9) SP3 has also agreed that if the cheque was an UMNO contribution it could not have been written as a cash cheque, *albeit*, crossed;

(10) SP6 has also said that he told SP1 that there was no necessity to give Dato' Saidin the cheque because the joint venture agreement between Adiras and Nusantara had been terminated and that, furthermore, Nusantara had not made any profit yet but it was SP1 who pressured him on several occasions to issue the cheque in the form of a cash cheque which was to be paid to the Selayang UMNO division because the Selayang UMNO division had a special fund which was not audited and that Dato' Saidin had asked that it be given in cash or in the form of a cash cheque;

(11) SP6 also said that the letter, P13, was prepared and then typed by SP26 who was SP1's secretary at that time specifically for this purpose, that he wrote the letter of complaint, D16, to DSAI, upon the instigation of SP1 when he neither received a receipt for the cheque from SP1 nor

A Selayang UMNO, there was also no building which was constructed by Selayang UMNO, that he and Edward Lee suspected that SP1 may have taken the money for himself and the straw which broke the camel's back was when SP1 asked him and Edward Lee to pay another 1 million to
B Dato' Saidin when the project was yet to be implemented;

(12) SP9, Edward Lee's evidence is consistent with SP6's evidence that it was SP1 who pressured him to issue the cash cheque for 1 million as a contribution to the secret
C fund of Selayang UMNO but he crossed it as a precaution;

(13) SP8, SP15, SP18, SP23 and SP24 are neutral witnesses as opposed to SP2, SP6, SP9, SP11 and SP16 because they do not have any interest in the matter and are not aligned to either SP1 or Dato' Saidin;
D

(14) SP8 said he was forced by SP9 to sign the circular resolution that the 1 million was a contribution for the Selayang UMNO division and he has categorically said that a chartered accountant who testifies in court that a crossed
E cash cheque need not be put into an account is not qualified to be an accountant because what he says is not right;

(15) SP8 also said that in view of the circular resolution there
F was nothing wrong in issuing the cheque in the name of Selayang UMNO;

(16) SP15 said that Nusantara's application was processed on a first come first serve basis and was not processed on an
G expedited basis;

(17) SP18 said that out of the three applications for the land, Nusantara's application contained the best proposal and that was why the State EXCO in its meeting on 4 October 1995 which was chaired by him approved the application;
H

(18) SP18 also said he did not ask Dato' Saidin for RM 1 million in order to approve Nusantara's application;

(19) SP18 further said categorically that as an ordinary State Assemblyman it was not illegal or unlawful for Dato' Saidin
I who was not a member of the State EXCO to engage in

business or to lobby him for approval for applications for land for his own company or for his constituent members and to receive a commission as a remuneration for doing so without declaring to him his interest or the commission which he has received;

(20) SP18 and SP23 have said that all political donations can be made openly and are channelled to the State UMNO Liaison Committee which has a Chairman and a Treasurer and there is no such thing called a secret fund;

(21) Both of them also say that SP1 who is the deputy head of the Selayang UMNO division would have known that;

(22) SP24 said it was SP1 who instructed him to confront Dato' Saidin in a polite manner with a copy of the cheque and to ask Dato' Saidin to withdraw from defending the post of division head of Selayang UMNO in order to give way to SP1 who was the deputy head and an accountant otherwise SP1 will report the case concerning the cheque to the ACA; and

(23) SP24 said categorically that upon being confronted with the photostat copy of the cheque Dato' Saidin did not appear nervous or scared and on the contrary he appeared happy and told SP24 that the cheque was a business deal between himself and SP1 and for SP24 to inform SP1 that he would defend his post.

Dato' Muhammad Shafee's Submissions

[196] In his written submissions dated 28 October 2008, Dato' Muhammad Shafee submitted that the main ground of Dato Saidin's appeal is that the learned SCJ erred in law and in fact when she ruled that the prosecution had established a *prima facie* case in respect of all the ingredients of the charge and, consequently, ordered Dato' Saidin to make his defence.

[197] The learned SCJ also made serious errors in her grounds of judgment when she invoked s. 8 of the Act against Dato' Saidin when Dato' Saidin was never charged under s. 8 of the Act. The charge against Dato' Saidin was only under s. 3(a)(i) of the Act. The learned SCJ did not at any time alert the defence to her intention to invoke s. 8 of the Act against Dato' Saidin.

A As a result of her omission to do so there was a gross breach of the rules of natural justice as Dato' Saidin did not know what was the real case against him resulting in Dato' Saidin being seriously prejudiced. He cited the Privy Council case of *Walter Annamunthodo v. Oilfields Workers' Trade Union* [1961] AC 945.

B

[198] Apart from that Dato' Muhammad Shafee also submitted that the learned SCJ erred in accepting the evidence of SP1 because he was a blatant liar having lied again and again when giving evidence against Dato' Saidin. The learned counsel has C described SP1 as an oily man who clearly had a vested interest in the successful prosecution of Dato' Saidin and who went all out to ensure that the charge stuck to Dato' Saidin so as to get Dato' Saidin out of the way of SP1's path towards a successful political career as the new Head of the Selayang UMNO division.

D

[199] SP1 was obviously an interested witness because he was contesting the post of the Head of the Selayang UMNO division, of which Dato' Saidin was the incumbent at the material time. SP1 made use of the ACA as his pawn in his battle against Dato' Saidin in order to achieve his political ambition. SP1 tried to E prevent the appellant from contesting in the UMNO divisional elections by attempting to get Dato' Saidin out of the way. To this end SP1 accused Dato' Saidin of corruption. He also caused Dato' Saidin to be featured in flyers and in the newspaper so that Dato' Saidin would be arrested by the ACA. Dato' Saidin has F lodged a police report against SP1 for blackmailing him through an intermediary, namely, Dato' Abd. Rahim bin Osman, SP24.

[200] The credibility of SP1, Dato' Dr. Hanifah bin Nordin, was, therefore, in grave doubt. Apart from that, SP1's evidence also G included hearsay evidence which was clearly inadmissible and the learned SCJ erred in accepting SP1's evidence and in overruling the objection of the defence on the wrongful admission of inadmissible hearsay evidence.

H **[201]** Another ground of appeal was that the two-year delay of the learned SCJ in giving her grounds of judgment had prejudiced Dato' Saidin.

[202] Therefore, in view of the serious errors on the part of the learned SCJ, Dato' Saidin's appeal ought to be allowed and the I whole of the learned SCJ's decision ought to be set aside.

Dato' Abdul Razak's Submissions

[203] On the other hand, Dato' Abdul Razak bin Musa ("Dato' Abdul Razak"), the learned Deputy Public Prosecutor ("DPP") submitted that the learned SCJ made correct findings of fact after evaluating all the evidence and assessing the credibility of the witnesses. He also submitted that the decision of the learned SCJ; that the prosecution had succeeded in making out a *prima facie* case was correct, because the prosecution had proven that Dato' Saidin had corruptly accepted a gratification in the form of a cash cheque for RM1 million from SP1 as a remuneration for assisting Nusantara's application for the land.

[204] Dato' Abdul Razak repeatedly submitted that the charge against Dato' Saidin was for corruptly receiving the RM1 million because the RM1 million cheque was given at night to Dato' Saidin at Dato' Saidin's house and Dato' Saidin subsequently banked it into his account. More importantly, he has submitted that SP1 testified that Dato' Saidin asked, demanded and pestered him for the sum of RM1 million and that SP1 gave the RM1 million cheque to the appellant because he could no longer withstand the pressure exerted on him by Dato' Saidin.

[205] In his defence, Dato' Saidin has said he did not know why SP1 gave him the RM1 million cash cheque because SP1 did not say anything to him when SP1 gave him an envelope containing the cash cheque. Dato' Saidin thought about the matter and concluded that the RM1 million cash cheque which was given to him by SP1 could be for one or two or three matters ie, as commission for himself for assisting Nusantara's application for the land, or as part compensation to SP10, Bill Chin of a sum of RM2 million which was rightfully due to Bill Chin because the joint venture agreement between Bill Chin and Nusantara was terminated after Nusantara's application for the land was successful, or as compensation and also arrears of unpaid salaries to SP11, Mohd Khalili bin Abdullah and the other directors of Nusantara because they were forced by SP1 to resign from the Board of Directors of Nusantara.

[206] Therefore, according to the submissions of Dato' Abdul Razak, the question which arose for the determination of the learned SCJ at the end of the defence case was whether Dato' Saidin could accept the cash cheque for RM1 million as commission for helping Nusantara to get the land in his capacity as a State Assemblyman?

[207] Dato' Abdul Razak has submitted in no uncertain terms that this sum of RM1 million is corrupt money. According to him there must be a strict and total prohibition on the acceptance of such monies by a State Assemblyman otherwise all State Assemblyman even though they are not members of the State EXCO or members of the authority which is giving the approval need not do any other work except to use their influence to assist parties to get projects or land in return for commissions.

[208] Dato' Abdul Razak further submitted that the testimony given by SP18 that State Assemblyman are allowed to accept commissions was just a passing remark and has no bearing on the facts in Dato' Saidin's appeal because it was made in the context whether State Assemblyman are allowed to operate their own businesses.

[209] The learned SCJ was, therefore, correct in ruling that the defence had failed to raise a reasonable doubt in the prosecution case that Dato' Saidin has committed an offence under s. 3(a)(i) of the Act.

[210] Dato' Abdul Razak referred to the case of *Ramanathan Chelliah v. PP* [2009] 6 CLJ 55, in support of his submission that the delay in the preparation of the written grounds of judgment by the learned SCJ did not occasion any prejudice or injustice to Dato' Saidin.

[211] With regard to the Public Prosecutor's cross-appeal against sentence Dato' Abdul Razak submitted that the sentence of one year imprisonment was manifestly inadequate when compared to the offence committed by Dato' Saidin because it was not a sufficient deterrent to Dato' Saidin or other would-be offenders. He also referred the court to some decided cases where the amount of corrupt monies involved was smaller but the sentence which was meted out by the courts was more severe. (See *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150, *Lee Mun Foong v. Public Prosecutor* [1976] 1 LNS 57, *Ahmad Shah Hashim v. Public Prosecutor* [1979] 1 LNS 4, *Mahesan v. Public Prosecutor* [1970] 1 LNS 75, *Public Prosecutor v. Dato' Waad Mansor* [2005] 1 CLJ 421 and *PP v. Dato' Sahar Arpan* [1999] 3 CLJ 427).

Issues For The Determination Of This Court

[212] From the submissions of the parties, the court was of the view that there were three main issues and two sub-issues which required the determination of this court. The three main issues are as follows:

(1) Whether the learned SCJ erred when she ruled that the prosecution had succeeded in showing a *prima facie* case against Dato' Saidin as per the charge at the close of the prosecution case?

(2) Whether the learned SCJ erred when she invoked s. 8 of the Act against Dato' Saidin without first giving notice to the defence of her intention to do so?

(3) Whether this court ought to dismiss Dato' Saidin's appeal against his conviction and sentence and substitute the principal charge under s. 3(a)(i) of the PCA 1961 to a distinct charge under s. 8 of the PCA 1961 in exercise of the discretion conferred on the court by ss. 166, 167 and 316(b) of the CPC?

[213] The Two Sub-issues Are As Follows

(1) Whether there was sufficient evidence before the learned SCJ that Dato' Saidin corruptly received the gratification of RM1 million as remuneration for himself from SP1?

(2) If the answer to (1) is "yes", whether there was sufficient evidence before the learned SCJ that the corrupt receipt of the RM1 million gratification by Dato' Saidin was as remuneration for Dato' Saidin's assistance in procuring or obtaining the approval of the Selangor State EXCO in respect of Nusantara's application?

1st Main Issue: Whether The Learned SCJ Erred When She Ruled That The Prosecution Had Succeeded In Showing A *Prima Facie* Case Against Dato' Saidin As Per The Charge At The Close Of The Prosecution Case?

[214] In this case Dato' Saidin was charged unders 3(a)(i) of the Act for receiving corruptly a gratification in the form of a RM1 million cheque from SP1 as remuneration for assisting Nusantara in obtaining the approval of the Selangor State EXCO in respect of its application for the land.

[215] The section provides as follows:

Punishment of corruption

3. Any person who shall by himself ...

(a) corruptly ... receive ... for himself ...; ...

(b) ...;

any gratification as ... reward ... on account of:

(i) any person doing ... anything in respect of any matter ... whatsoever, actual or proposed or likely to take place;

(ii) ...

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[216] Section 2 of the Act defines the word "gratification" to include:

(a) money or any gift, ... fee, reward, valuable security ...;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(g) ...; and

(h) ...;

[217] Based on the charge in the instant case this court is of the view that at the close of the prosecution case, the learned SCJ has to satisfy herself on a positive and maximum evaluation of the evidence adduced by the prosecution that the prosecution has succeeded in establishing the following ingredients of the offence as set out in the charge:

(1) Dato' Saidin has received for himself a gratification of RM1 million in the form of the cheque from Dato' Dr Hanifah bin Noordin, the former Executive Chairman of Nusantara on

15 March 1997 at about 12 midnight at Dato' Saidin's house at No. 2, Jalan Selaseh, Batu Caves, in the district of Gombak in the State of Selangor;

(2) the gratification was received by Dato' Saidin corruptly;

(3) the gratification was a reward for himself for assisting Nusantara to obtain the approval of the Selangor State EXCO for Nusantara's application for the land; and

(4) on 4 October 1995, the Selangor State EXCO approved Nusantara's application for the land.

[218] Based on the evidence which was adduced before the learned SCJ and which appears in the appeal record this court was satisfied that the learned SCJ was correct when she found that the prosecution had succeeded in establishing the 1st and 4th ingredients of the offence as set out in the charge. The reasons are because SP1, the key witness, had testified that he handed over the cheque to Dato' Saidin in the middle of the night, on 15 March 1997, at Dato' Saidin's house and the cheque has been banked into the personal account of Dato' Saidin. One year and five months' earlier on 4 October 1995, the Selangor State EXCO had approved Nusantara's application for the land.

[219] However, she erred when she found that the prosecution had succeeded in establishing the 2nd and 3rd ingredients of the offence as set out in the charge. The reasons are as follows:

[220] Having scrutinised the notes of evidence, the court found that there were very material contradictions of fact concerning the purpose of the giving of the RM1 million cheque by SP1 to Dato' Saidin.

[221] SP1, the key witness, had testified that he handed over the cheque together with the covering letter, P13, to Dato' Saidin in the middle of the night, on 15 March 1997, at Dato' Saidin's house and the cheque has been banked into the personal account of Dato' Saidin. One year and five months' earlier on 4 October 1995, the Selangor State EXCO had approved Nusantara's application for the land. The covering letter, P13, expressly states that the shareholders of Nusantara intended to give a contribution of RM1 million to the Selayang UMNO division to assist the division in the construction of a building for the office of the Selayang UMNO division.

[222] SP1 said the cheque was a contribution to UMNO and was given to Dato' Saidin in his capacity as the State Legislative Assemblyman for Selayang. The cheque although crossed was written as a cash cheque.

[223] This evidence of SP1 shows that the RM1 million cheque was intended as a contribution by the shareholders of Nusantara towards the Selayang UMNO division and it was given together with the covering letter, P13, by SP1 personally to Dato' Saidin in the middle of the night on 15 March 1997 at Dato' Saidin's house. The letter of complaint, D16, was written by SP6 and sent to DSAI because a year after the RM1 million cheque was given to SP1 by SP9, Edward Lee, after they were pressured by SP1 to issue the cash cheque they did not receive any receipt from SP1 and there was also no sign of the Selayang UMNO building. Apart from that SP1 had asked them to pay another RM1 million to Dato' Saidin when the project had not been implemented yet.

[224] The learned SCJ accepted the prosecution's submission that SP1's evidence to this effect is supported by the evidence of the other prosecution witnesses, namely, SP3, SP4, SP6, SP8 and SP9. All five of them have testified that the RM1 million cheque is Nusantara's contribution to the Selayang UMNO division.

[225] However, that is not stated in the charge which has been preferred against Dato' Saidin. Since the prosecution has chosen to frame the charge in the way it is framed, the burden is clearly on the prosecution to prove the ingredients of the offence as specified in the charge. This means that the prosecution must establish at the end of the prosecution case, a *prima facie* case, that Dato' Saidin corruptly received the RM1 million cheque as a gratification being a remuneration for assisting Nusantara to procure and obtain the approval of the Selangor State EXCO for its application for the land.

1st Sub-issue: Whether There Was Sufficient Evidence Before The Learned SCJ That Dato' Saidin Corruptly Received The Gratification Of RM1 Million As Remuneration For Himself From SP1?

The Law

What Is The Meaning Of The Word "Bribe"?

[226] The meaning of the word "bribe" as a verb at p. 173 of the *Concise Oxford English Dictionary*, 11th edn, Revised and Edited by Catherine Soanes & Angus Stevenson, Oxford University Press is "dishonestly persuade (someone) to act in one's favour by a payment or other inducement" and as a noun is "an inducement offered in an attempt to bribe".

[227] The decided cases cited by Dato' Abdul Razak mostly concern bribes solicited by or on their behalf or bribes given to renegade politicians, public officers and public servants in exchange for favours done, which favours inevitably involve the abuse or dishonest use of their powers or positions for their pecuniary advantage, or bribes solicited by or given to private individuals in exchange for favours done, which favours inevitably involve the dishonest non-compliance or breach of a clear provision in the law by the private individuals or the performance of acts which are expressly prohibited by the law.

[228] The twenty decided cases cited by Dato' Abdul Razak which fall under the first category are as follows:

(1) *Thavanathan*'s case, *supra*, which involved a serving Magistrate who was charged under s. 3(a)(i) with corruptly soliciting a gratification, to wit, a sum of RM15,000 as an inducement to acquit and discharge an accused person in a case before him and under s. 4(a) of the PCA 1961 for being an agent of the Government of Malaysia and corruptly accepting a gratification, to wit, a sum of RM15,000 as an inducement to acquit and discharge an accused person in a case before him;

(2) *Lee Mun Foong*'s case, *supra*, which involved an Assistant Examiner attached to the Income Tax Department, Ipoh who was charged with one charge under s. 4(a) of the PCA 1961 for being an agent of the Government of Malaysia and

corruptly obtaining a gratification for himself, to wit, cash $1,000 from one Wong On as an inducement to prepare his accounts so that less income tax was to be paid by him;

(3) *Ahmad Shah Hashim*'s case which involved an agent of the Government of Malaysia, namely a Wing Commander of the Royal Malaysian Air Force who was charged with one charge under s. 3(a)(ii) of the PCA 1961 for corruptly soliciting a gratification, to wit, 1 percent, representing one-third of the three percent commission due to a private company, Syarikat Bumiputra Sdn. Bhd. from Northrop Corporation, U.S.A. in order to recommend to the said Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force (RMAF) and four charges under s. 4(a) of the PCA 1961 for corruptly accepting four gratifications of $8,500, $5,350, $44,500 and $43,800 from a private company, Syarikat Bumiputra Sdn. Bhd. as a reward for recommending to the Government of Malaysia to purchase Northrop F-5 type aircraft for the RMAF;

(4) *Mahesan*'s case, *supra*, which involved an accused who was charged in his capacity as the agent of a public body, to wit, the Malaysian Government Officers' Co-operative Housing Society Ltd (the "housing society"), with two charges under s. 4(a) of the PCA 1961 for corruptly accepting two gratifications in cash payments of $82,000 and $40,000, respectively from one S.M. Manickam as his reward for services rendered in connection with the purchase of certain land at Sungai Dua, Penang which involved a secret pact made by the accused with S.M. Manickam for the latter to purchase the land at $8,000 per acre and resell it to the housing society at double the price;

(5) *Mohamed Taufik v. Public Prosecutor* [1974] 1 LNS 95 which involved a probationary inspector of the Royal Malaysian Police, who was charged with two charges under s. 4(a) of the PCA 1961 for corruptly obtaining from one Wong Bok Yin for himself a gratification of cash of $500 and $490 as an inducement to refrain from taking action against the said Wong Bok Yin for being in possession of goods which were alleged to be imitation goods;

(6) *Dato' Waad bin Mansor*'s case, *supra*, which involved an accused who was both a State Assemblyman and a member of the State EXCO and who took part in a decision in which he was interested and who was charged with three charges of committing corrupt practice under s. 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970; A B

(7) *Datuk Hj Sahar Arpan*'s case, *supra*, which involved an accused who was both a State Assemblyman and a member of the State EXCO and who participated in the deliberation of his own application for government land and who was charged with three charges for committing corrupt practice under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970; C

(8) *Goh Leng Sai v. Regina* [1958] 1 LNS 24 which involved the accused, who had a contract with the Singapore City Council and who was charged with one charge under s. 3(b) for corruptly giving $1,000 as an inducement or reward to an agent of a public body, namely, G.M. Richards, the acting Chief Engineer (Construction) of the Sewerage Department of the City Council and punishable under s. 4 of the Prevention of Corruption Ordinance (Cap. 121); D E

(9) *Hashim v. Public Prosecutor* [1967] 1 MLJ 251 which involved an accused who was charged with one charge under s. 4(c) of the PCA 1961 for knowingly giving to an agent of the Government of the State of Selangor, to wit, a financial clerk in the District Office, Ulu Langat a document which he knew contained a false information; F

(10) *Public Prosecutor v. Wan Razali Kassim* [1970] 1 LNS 121 which involved an accused who was a policeman and who was charged with one charge under s. 4(a) of the PCA 1961 for corruptly accepting $40 from PW3 as an inducement for not taking action against PW3 for using a motorcycle whilst he was not covered by a third party risk insurance policy as required by the Road Traffic Legislaton; G H

(11) *PP v. Selvarajoo Ramachandran & Ors* [2005] 6 CLJ 114 which involved four policemen who were charged with one charge under s. 3(a)(ii) of the PCA 1961 for being agents of the Malaysian Government and soliciting a gratification of cash of RM10,000 from the complainant and two charges I

under s. 4(a) of the PCA 1961 for corruptly accepting two gratifications of RM1,000 and RM3,000 from two complainants as an inducement for not taking action against them for having in their possession six forged passports belonging to Indonesian citizens;

(12) *Shaiful Idzam Sulaiman v. PP* [2004] 2 CLJ 121 which involved an accused who was a police investigating officer and who was charged with one charge under s. 1(a) of the Anti-Corruption Act 1997 for corruptly accepting from the complainant a sum of RM500 for the return of his IC after the complainant was released from remand in connection with drug related offences;

(13) *Datuk Haji Harun bin Haji Idris (No. 2)*'s case, *supra*, which involved an accused who was a Menteri Besar and who participated in the approval of an application for a piece of State land in which he had an interest and who was charged with one charge under s. 3(a)(ii) of the PCA 1961 for corruptly soliciting for a political party a gratification as an inducement for his aiding in procuring the approval of the HSBC's land application and an alternative charge under s. 4(a) of the PCA 1961 and two charges under s. 9(b) of the PCA 1961 for corruptly accepting two gratifications of $25,000 and $225,000, respectively, as an inducement for his aiding in procuring the approval of the HSBC's application for land and two alternative charges under s. 4(a) of the PCA 1961 for corruptly accepting the two gratifications as an inducement to approve the application;

(14) *Low Seng Wah v. Public Prosecutor* [1961] 1 LNS 55 which involved an accused who was a police corporal and who was charged with one charge under s. 3(a) of the Prevention of Corruption Ordinance 1950 (No. 5/50) for receiving moneys for showing favour to his principal's affairs, to wit, by promising to assist the complainant in settling a samusu case which is still under investigation *vide* Bagan Serai Report No. 547/60;

(15) *Ng Kok Lian & Anor v. Public Prosecutor* [1983] 2 CLJ 247; [1983] CLJ (Rep) 293 which involved an accused who was charged with one charge under s. 6(ii) of the PCA 1967 for the giving of a bribe to a public officer;

(16) *Mohamed Long v. Public Prosecutor* [1971] 1 LNS 80 which involved an accused who was a Forest Ranger of the Forest Department Trengganu and who was charged with one charge under s. 4 of PCA 1961 for corruptly accepting a gratification of $600 in the form of a cheque as a reward for forbearing to collect royalty on timber;

(17) *Haji Abdul Ghani Ishak & Anor v. Public Prosecutor* [1981] 1 LNS 96 which involved an accused who was a member of the Melaka State EXCO and who participated in the deliberation for approving an application for State land in which he had a pecuniary interest and who was charged with one charge under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970;

(18) *Hamidon Mat Yatim v. Public Prosecutor* [1995] 3 CLJ 724 which involved an accused who was the Assistant Director of Registration at the Registration Department, Johor Bahru, and who was charged with one charge under s. 4(a) of the PCA 1961 for corruptly receiving, as an agent of a public body, to wit, the Government of Malaysia a sum of RM500 from the complainant in relation to his daughter's late registration of birth;

(19) *Lionel De Silva v. Regina* [1956] 1 LNS 61 which involved an accused who was a police detective and who was charged with one charge under s. 3(a) of the Prevention of Corruption Ordinance 1937 for corruptly accepting $112 as an inducement to show favour to certain bus conductors by not reporting suspected offences of criminal breach of trust in relation to fares; and

(20) *Yassin Bachik lwn. Pendakwa Raya* [1994] 4 CLJ 629 which involved an accused who was a police officer and who was charged with one charge under s. 4(a) of the PCA 1961 for corruptly receiving a gratification from the complainant in order to refrain from taking action against him for an alleged offence of assisting in the disposing of stolen property.

[229] The four decided cases cited by Dato' Abdul Razak which fall under the second category are as follows:

A (1) *Wong Cheong Kim v. Deputy Public Prosecutor* [1962] 1 LNS 207 which involved an accused, a private individuals who was charged with one charge of bribery of the Superintendent in charge of the Markets and Hawkers Department of the City Council in order that his application for a stall in the market
B would be approved;

(2) *Pendakwa Raya lwn. Chellapa Pillai a/l Govindasamy* [1994] MLJU LEXIS 830 which involved an accused, a private individual, who was the Manager of Syarikat City Adjusters
C and Investigations Sdn Bhd which was appointed to investigate a fire at the premises of Syarikat Takbir Sdn Bhd and the insurance claim made by Syarikat Takbir Sdn Bhd; and who was charged with two charges, one under s. 4(a) of the PCA 1961 for corruptly accepting a gratification of $1,000
D as a gratification for the clerks of Malaysian British Assurance so that the complainant's file can go up quickly to enable the complainant's insurance claim for payment to be processed quickly and another charge under s. 3(a)(i) of the PCA 1961 for corruptly soliciting $1,000 as a gratification for the clerks
E of Malaysian British Assurance so that the complainant's file can go up quickly to enable the complainants insurance claim for payment to be processed quickly, where the accused was acquitted on the first charge and convicted on the second charge;

F (3) *Public Prosecutor v. Sally Chan Kit Tong* [1991] 1 CLJ 448; [1991] 1 CLJ Rep 396 which involved an accused, a private individual, who was a developer and who sold low cost houses at prices approved and fixed by the State Government at the relevant time but who corruptly solicited a sum of RM15,000
G as under counter money in respect of a booking of one unit of low cost house by the complainant and was charged with one charge under s. 3(a)(i) of the PCA 1961 for corruptly receiving the sum of RM15,000. The Sessions Court convicted and sentenced the accused. The accused appealed to the
H High Court. The High Court allowed her appeal. The Public Prosecutor appealed. The Supreme Court allowed the appeal. The Supreme Court held that a person who corruptly receives any gratification for himself/herself or for any other person
I under s. 3(a)(i) of the PCA 1961 need not be a public officer and he shall be guilty under the section. The Supreme Court

held that any demand over and over the price fixed by the State Government was contrary to State Government's decision and that any such demand solicited secretly, to be paid without the knowledge of the State Government would amount to corruption under s. 3(a)(i) of the PCA 1961; and

(4) *You Kong Lai*'s case which involved an accused, a private individual, who was charged with one charge under s. 3(a)(ii) of the PCA 1961 for corruptly accepting a gratification RM25,000 (falsely) claiming that it was an inducement for the District Officer in order to renew the licence of a nightclub;

What Is The Meaning Of The Word "corrupt"?

[230] The decided cases have held that the corrupt element in the receiving of the gratification can be established where the prosecution has been successful in establishing that the soliciting for the gratification was done corruptly.

[231] The court agreed with and accepted the submissions of both parties that based on the decision of Raja Azlan Shah FJ (as His Royal Highness then was) in the case of *Public Prosecutor v. Datuk Haji Harun Haji Idris (No. 2)* [1976] 1 LNS 97 H in the right hand column under the sub-heading "(3) That the circumstances in which gratification was solicited give rise to the inference that it was solicited corruptly" that the word "corrupt" means:

> doing an act knowing that the act done is wrong. Doing so with evil feelings and evil intentions" (see *Lim Kheng Kooi v. Reg.*) (2) purposely doing an act which the law forbids: (see *R. v. Smith*). (3).

[232] The learned judge then continued to say as follows at para. I-H in the left hand column at p. 23A:

> "Corrupt" is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the ambit of the section. The real point is whether there is soliciting a political donation with a corrupt intention.

A The manner in which the payments were made is a relevant consideration in the present case. It is in evidence that the bank was asked to make them in cash. Smorthwaite said that he asked Peter Lim to find out how such payment should be made, and his answer was in cash, no receipt. That is substantiated by the evidence of payments in cash. The bank could, and it is very much in their power, make the payment by way of cheque, or for that matter in one lump sum in cash. But they were coerced to make it in cash, and strangely enough, in two payments. This strange behaviour necessitated the bank in opening the New Building – Property Suspense Account for their accounting purposes.

Then, the "request" for the so-called donation. That is another telling point against the accused. In ordinary circumstances, the presentation of a donation, be it by way of cheque or otherwise, is preceded by certain formalities, for example, a representative of the donor firm would personally hand it to the donee at a proper place and in the presence of witnesses; not in some "back alley". I am quite sure that the donor wants to be present to show that he is participating in whatever worthy cause the donee is undertaking, be it politics, charity, education or welfare. The donation is then properly presented and properly acknowledged. In the present case, the donation was "presented" in a very strange way. It was made in two substantial payments, one at the airport on the eve of the accused's departure overseas, and the other, literally from a locked tin-box kept at the bank at the accused's disposal. Granted that the accused could receive a cash donation, the question arises as to why did he not take the whole lot at one time and have it deposited in the Special Fund Account at the Mercantile Bank? Why on two separate occasions, and an interval of 7 ½ months? Is not such conduct contrary to human instinct and human nature, unless there is the overwhelming stimulus of guilt? It does appear somewhat curious and not a little disquieting that a donation should be demanded and accepted in this manner; it is incomprehensible in its motivation, unless there is a consciousness of guilt. The manner how the donation was demanded and received, in my view, lends credence to the prosecution story that it was being solicited with a corrupt mind. If the defence wish to say that the two payments were innocently demanded and received, it is for the accused to explain them. It is not the law that the prosecution has to eliminate all possible defences or circumstances which may exonerate the accused. Of course I am not unmindful of the onus on the prosecution to establish a *prima facie* case in the first instance, and that it is not enough for them to establish the facts and then to throw the onus on the accused to prove his innocence.

[233] In that case, the accused was charged with three charges of corruption. The first charge was framed under s. 3(a)(ii) of the PCA 1961 for corruptly soliciting for a political party, namely, United Malays National Organisation (UMNO), a gratification, to wit, $250,000 from the Hong Kong and Shanghai Banking Corporation (the "HSBC"), Kuala Lumpur, as an inducement to the accused, being a member of a public body, namely, the Government of the State of Selangor, to obtain the approval of the Executive Council of the Government of the State of Selangor (the "Selangor State EXCO") in respect of an application of the HSBC for alienation of a piece of State land held under T.O.L. 6450, for the purpose of amalgamating the land applied for with three other pieces of land, ie Lots 76, 77 and 78, Section 11, in the City of Kuala Lumpur and to construct thereon a multi-storey building.

[234] The second charge was framed under s. 9(b) of the PCA 1961 for accepting, as a member of a public body, to wit, Menteri Besar, Selangor from the HSBC, for a political party, namely, UMNO, a gratification, to wit $25,000 cash through one Haji Ahmad Razali bin Haji Mohd Ali as an inducement for his aiding in procuring the performance of an official act, to wit, to obtain the approval of the Selangor State EXCO in respect of an application of the HSBC for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with three other pieces of land, ie Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building. The alternative charge to the second charge was framed under s. 4(a) of the PCA 1961.

[235] The third charge was also framed under s. 9(b) of the PCA 1961 for accepting, as a member of a public body, to wit, Menteri Besar, Selangor from the HSBC, for a political party, namely, UMNO, a gratification, to wit $225,000 cash as an inducement for his aiding in procuring the performance of an official act, to wit, to obtain the approval of the Selangor State EXCO in respect of an application of the HSBC for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with three other pieces of land, ie Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building. The alternative charge to the third charge was framed under s. 4(a) of the PCA 1961.

[236] In the case cited above, the learned judge held that the soliciting for the donation was done with a corrupt mind because it was connected to the use by the accused of his position as a member of a public body, to wit, Menteri Besar of Selangor, to approve the land application of the HSBC. Similarly the acceptance of the two gratifications of $25,000 and $225,000 was corrupt because it was done as an inducement to the accused to use his position as a member of a public body, to wit, Menteri Besar of Selangor to approve the land application of the HSBC. The learned judge also held that there was the overwhelming stimulus of guilt on the part of the accused because the conduct of the accused in not taking the whole lot of the cash at one time and depositing it in the Special Fund Account at the Mercantile Bank was contrary to human instinct and human nature and was incomprehensible in its motivation unless there was a consciousness of guilt. The manner how the donation was demanded and received lent credence to the prosecution story that it was being solicited with a corrupt mind. It was for the accused to explain the two payments which he received, if it was his defence that the two payments were innocently demanded or received.

[237] In *Thavanathan*'s case, *supra*, the accused was charged with two charges. The first charge was under s. 3(a)(i) for corruptly soliciting for himself a sum of RM15,000 from one Wong Sow Ying through one Por Choo Aik @ William as a bribe, to wit, an inducement to acquit and discharge the said Wong Sow Ying of an offence in a criminal case ('the charge of soliciting'). The second charge was under s. 4(a) for corruptly accepting for himself a sum of RM15,000 from one Por Choo Aik through one Ong Leong Chuan as a bribe, to wit, an inducement to acquit and discharge one Wong Sow Ying of an offence in a criminal case ('the charge of accepting').

[238] He was acquitted and discharged under the first charge. He was found guilty and convicted under the second charge. He was sentenced to three years imprisonment and a fine of RM5,000 in default 12 months imprisonment for the second charge.

[239] The Federal Court on a reference under s. 66 of the Courts of Judicature Act 1964 (which was repealed on 24 June 1994 but leave was granted prior to that date) said as follows at p. 411 E-H:

> Facts or evidence in the earlier trial may be admitted in the subsequent trial where such facts or evidence are relevant or necessary to establish some relevant fact, eg in identifying the occasion on which some particular statement or admission was made (as per Lord MacDermott in *Sambasivam v. PP*, Federation of Malaya) or that some conduct took place.
>
> Therefore, on the question of general nature as raised and in the context of the case presently under reference without pinpointing to any particular piece of evidence, it is our view that the answer is in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence relating to relevancy which, in our present context, are principally ss. 5, 6, 7, 8 and 9 of the Evidence Act 1950 (ie briefly, if the evidence constitutes facts in issue, or if the evidence constitutes collateral facts which: (i) form part of the same transaction, or (ii) are the immediate occasion, cause, or effect of fact in issue, or (iii) show motive, preparation, or conduct affected by a fact in issue, or (iv) are necessary to be known in order to introduce or explain some relevant fact) unless the exclusionary rules, eg rules relating to hearsay apply.

and as follows at p. 412 B-D:

> ... Supposing the applicant had only been charged with the offence of accepting, would the aforesaid evidence of the applicant smiling and nodding have been relevant? We have no doubt that it would. In the instant case under reference, the evidence, in our view, is clearly relevant to both the first charge of soliciting and the second charge of receiving, and is admissible. The evidence is relevant to the second charge of receiving as being so connected as forming part of the same transaction though occuring at different time and place or as being conduct preparatory to receiving or bearing relation to the offence of receiving or explanatory of the nature of the transaction.

and further down on the same page at para G-H observed as follows:

> It is significant to note that after making the above quoted observation, the learned appellate judge, in discussing the charge of accepting in his judgment, did not make any reference to the incident at the coffee house of the Grand Pacific Hotel.

[240] This court notes that in the course of coming to the conclusion that the conviction was good the Federal Court mentioned ss. 14 and 18 of the PCA 1961.

[241] Section 14 of the PCA 1961 provides as follows:

> **14. Presumption of corruption in certain cases**
>
> Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, the gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved.

[242] Section 18 of the PCA 1961 provides as follows:

> **18. Evidence of accomplice**
>
> Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

[243] However those two sections are not applicable in the present appeal because Dato' Saidin was not charged as an agent of or as a member of a public body or as an employee of a public body.

[244] In the instant case, it is important to bear in mind that Dato' Saidin was not charged under s. 3(a)(ii) of the PCA 1961 for corruptly accepting the cheque to approve Nusantara's application because he was not a member of a public body, to wit, a member of the State EXCO at that time as he was only an ordinary State Assemblyman. In my view, the learned SCJ had to find credible and cogent evidence of the corrupt soliciting of the cheque on the part of Dato' Saidin or that the acceptance of the cheque by Dato' Saidin was against the law in order to render the receipt a corrupt receipt.

[245] The case of *Public Prosecutor v. You Kong Lai* [1984] 1 CLJ 379; [1984] 2 CLJ (Rep) 429 which was cited by Dato' Abdul Razak is also distinguishable on facts. In that case the night-club licence of the Swan Palace Night Club at Batu Pahat was cancelled on 18 October 1980. Since the cancellation resulted in heavy financial losses for the club, its Board of Directors decided to make every effort to get the licence renewed. But their

approaches to the authorities were unsuccessful. After a lapse of some weeks it was the accused who approached the complainant, PW4, the manager of the night club.

[246] The accused told PW4 he could help to get the licence renewed. The accused told PW4 that the District Officer wanted $30,000. After some bargaining the amount was reduced to $25,000 and the accused was given $15,000 in cash and a post-dated cheque for $10,000. The accused then purported to get in touch with the District Officer and subsequently the licence was renewed. The District Officer who gave evidence for the prosecution said he did not know the directors of the night club and he was not asked whether he knew the accused. There was, therefore, no evidence to show that the District Officer was in any way involved with the activitites of the accused.

[247] The District Officer had renewed the licence, as the police authorities, to whom an appeal had been made by the club, had informed him that they had no objections to the renewal of the licence. The post-dated cheque was paid into the accused's bank account. The accused was charged under s. 3(a)(ii) of the Prevention of Corruption Act 1961. At the end of the prosecution case, the learned President of the Sessions Court acquitted the accused on grounds that the prosecution had failed to prove that the District Officer had in fact been induced to renew the licence by reason of the corrupt payment. The Public Prosecutor appealed.

[248] Shankar J (as he then was) held as follows:

(1) upon a proper construction of s. 3(a)(ii) of the PCA 1961 as applied to the facts of the case it was not necessary for the prosecution to prove that the District Officer was in fact induced to renew the licences by reason of the payment of the gratification;

(2) the evidence led by the prosecution in the case went to show not only that the accused solicited the payments in question but also that he actually received the moneys. There was therefore some evidence on each essential element of the offence and the defence should have been called;

(3) The prosecution evidence if unrebutted can only lead to the conclusion that the accused was acting in complicity with somebody in the District Office, not necessarily the District Officer against whom there was no evidence on the record;

(4) In view of the unsatisfactory manner in which the records were kept in this case, a re-trial should be ordered before another President of the Sessions Court.

[249] At p. 301 D-I, the learned judge said as follows:

> Whether the defence should have been called thus depended upon whether there was some evidence (not inherently incredible) which established each essential element in the alleged offence.
>
> That there was such evidence is demonstrated by the answers to the following questions:
>
> 1. Did the accused receive any gratification?
>
> By Section 2 of the Act gratification includes money or an interest in property of any description. Having actually solicited payment from PW3 the Accused had received $15,000 cash and a post-dated cheque for $10.000 on December 27, 1980.
>
> 2. Was the receipt corrupt?
>
> Yes, since its avowed purpose was for bribery.
>
> 3. Was the gratification received as an inducement to a member of a public body doing anything?
>
> The accused is said to have represented that the money was required as a bribe for the renewal of the licence by the D.O.
>
> PW3 believed this representation and paid the money so that it could be used as a bribe. I hold therefore that the gratification was received as an inducement.
>
> 4. Was the public body concerned with the doing of that thing?
>
> There was evidence that the renewal of the licence was the concern of the District Office.
>
> There was therefore some evidence on each essential element of the offence and the defence should have been called. (emphasis added).

[250] The learned judge said that the receipt of the gratification by the accused was corrupt because its avowed purpose was for a bribery.

[251] In the instant appeal, Dato' Saidin was charged in the court below under s. 3(a)(i) of the PCA 1961. Dato' Abdul Razak has submitted that the receipt was corrupt because Dato' Saidin as a member of the State Legislative Assembly of the State of Selangor cannot accept any gratification for himself for helping any member of the public, otherwise all State Legislative Assembly members will not bother to do anything except to help members of the public in their applications for land so that they can be rewarded by the payment of commissions. He says such acts by any State Assemblyman are against the law. But he has not relied on any provision of the law to support his submission. The learned SCJ invoked s. 8 of the PCA 1961 in her written grounds of judgment which were supplied the learned counsel for Dato' Saidin some two years later. She did not invoke s. 8 of the PCA 1961 when she ruled at the close of the prosecution case that the prosecution had established a *prima facie* case against Dato' Saidin and called for his defence. But does s. 8 of the PCA 1961 clearly and expressly prohibit an ordinary State Assemblyman from doing such an act?

[252] In my view a clear distinction should be drawn between an act which is morally wrong and an act which is legally wrong because the court is not a court of morals but a court of law based on facts. In the instant appeal even if accepting a commission for doing the acts mentioned earlier by Dato' Saidin who is an ordinary State Assemblyman is morally wrong it is for the prosecution to establish that it is legally wrong. One way of doing it is to show that it is prohibited by the law. The prosecution must establish that Dato' Saidin in accepting the cheque was purposely doing an act which the law forbids. It is not enough for the prosecution to establish the facts and then throw the onus on the accused to prove his innocence because the onus on the prosecution is to establish a *prima facie* case in the first instance.

[253] The prosecution must be able to establish a *prima facie* case at the close of the prosecution case as per the charge as mandated under s. 180 of the Criminal Procedure Code (the "CPC") otherwise Dato' Saidin is entitled to be acquitted and

discharged without the calling of his defence under s. 180(2) of the CPC. This means that the prosecution must establish that in accepting the cheque Dato' Saidin was either accepting it with a corrupt mind or purposely doing an act which is prohibited by s. 8 of the PCA 1961 or any other law.

[254] The learned SCJ erred when she did not subject the evidence that was led by the prosecution against Dato' Saidin to a positive and maximum evaluation in order to determine this issue. She merely presumed that the act was prohibited by s. 8 of the PCA 1961. The court was of the view that the learned SCJ should have considered the issue whether the prosecution had succeeded in showing that the receipt of the gratification was done corruptly by Dato' Saidin independently of s. 8 of the PCA 1961 since s. 8 of the PCA 1961 was never invoked by any of the prosecution witnesses during the trial.

[255] In *Public Prosecutor v. You Kong Lai, supra*, the learned judge had the opportunity of considering another case, namely, *Mohamed Kassim v. Public Prosecutor* [1981] 1 LNS 42 which was decided by Mohd Azmi J (as he then was) where there were some factual similarities, and where Mohd Azmi J (as he then was) held that the correct charge ought to be for cheating instead of for corruption. However, Shankar J (as he then was) took a different view that in a charge where the gratification was received as an inducement to a public officer it was not necessary for the prosecution to prove that the corrupt money was gratification received as an inducement to a public officer. It was because of this view that he, consequently, held that it was not necessary for the prosecution to prove that the District Officer was in fact induced to renew the licence by reason of the payment of the gratification.

[256] The learned judge also relied heavily on the evidence led by the prosecution that the accused not only solicited the payments in question but also that he had received the money. The learned judge further found corroboration of PW3's evidence in the evidence that, the very post-dated cheque handed to the accused had ended up in the accused's bank account.

[257] So the proof for the corrupt element in the receiving of the monies was in the evidence of the soliciting by the accused. According to the learned judge, PW3 had given clear evidence

that in his own mind he had no doubt that he was paying these monies on the strength of the representations made by the accused that unless those payments were made the licence would not be renewed. A

[258] In the instant appeal there is no reliable and cogent evidence that SP1 gave the cheque to Dato' Saidin based on a representation made by Dato' Saidin to him that unless the 1 million was paid as a bribe to him and another 1 million was paid as a bribe to the Menteri Besar the State EXCO would not approve Nusantara's application. It is important to bear in mind that the cheque was only given to Dato' Saidin one year and five months after Nusantara's application was approved by the State EXCO. B C

[259] The learned SCJ also erred when she did not appreciate the serious material contradictions in the evidence of the various prosecution witnesses concerning the purpose of the giving of the RM1 million cheque to Dato' Saidin. If she had done so, she would have concluded that there was no cogent and credible evidence that Dato' Saidin had corruptly received the RM1 million as per the charge against him. D E

[260] This court was of the view that the learned SCJ made a grave error when she believed and accepted the evidence of SP1 which included inadmissible hearsay evidence, without subjecting it to a maximum and positive evaluation and without corroboration, as he was an interested witness, who had told lies on several occasions. SP1 clearly had a motive to give false evidence against Dato' Saidin because he had a vested interest in ensuring that Dato' Saidin was convicted so as to prevent Dato' Saidin from contesting against him and another candidate in the UMNO elections for the post of division head of UMNO, Selayang of which Dato' Saidin was the incumbent at the material time and for which post SP1 was also contesting. F G

[261] The failure of the learned judge to direct herself on the issue whether it was safe to convict Dato' Saidin as per the charge solely on SP1's evidence without independent evidence of relevant circumstances connecting Dato' Saidin with the crime as stated in the charge amounts to a non-direction. This is especially so when the prosecution had elected not to prefer a separate H I

charge against Dato' Saidin for corruptly soliciting for the RM1 million and yet had elected to prefer a single charge for corruptly receiving the RM1 million. And in doing so the prosecution had also sought to rely on the uncorroborated evidence of SP1 to show that Dato' Saidin had corruptly solicited for the RM1 million in order to render the receipt by Dato' Saidin of the RM1 million cash cheque a corrupt receipt, and, therefore, a separate offence under s. 3(a)(i) of the PCA 1961. This court was of the view that the conviction was manifestly unsafe.

[262] Although the learned SCJ had relied on the case of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2), supra*, in order to satisfy herself that the "corrupt" ingredient was established by the prosecution she had omitted to refer to the comments of the learned judge in that case on the issues concerning the credibility of witnesses, discrepancies in the testimonies of witnesses and the need for corroboration. The learned judge in that case has said as follows at p. 19 B-I in the right hand column to p. 20A in the left hand column:

> In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971-1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a note-book and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses of this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

It is also salutary to remember that in a corruption case, direct testimony of wholly disinterested witnesses can seldom, if ever, be forthcoming. It is invariably circumstantial evidence which has to be availed of in such a case.

Another salutary principle to observe is the fact that this is not a court of morals, and I am not to allow any moral disapproval to colour my judgment on matters of fact.

It is in this light that the evidence of the prosecution witnesses, in particular that of Peter Lim, Rosedin, Chew Beng Chiat and the bank officials mut be considered. Their testimonies are not to be rejected in toto as tainted without adequate justification, without meticulous scrutiny. The further circumstance that they are interested witnesses assumes a greater significance and it may not be prudent to base a conviction on their sole evidence without corroboration.

The object of corroboration is no doubt to satisfy the court that the witnesses are telling the truth and that it is reasonably safe to act upon them. It is not necessary that the corroboration should be of the actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime.

[263] Upon the conclusion of the trial in the above cited case the learned judge found that there was overwhelming evidence that a request for a political donation was made in April 1972, that it was impossible for any court to doubt that the request really came from the accused who was then the chairman of the Selangor UMNO Liaison Committee and also the Menteri Besar of Selangor, that there was a trail of surreptitious cash payments demanded and received, long and wide enough to sustain an inference that the donation was solicited with a corrupt mind, that the accused solicited the gratification as an inducement to obtain approval of the Selangor State EXCO in respect of the HSBC's land application; that the accused accepted from the HSBC a gratification of $25,000 through Haji Ahmad Razali at the airport on or about 16 August 1972, that the accused on or about 27 March 1973, accepted from the HSBC, a gratification of $225,000 in his office in Kuala Lumpur; and that the accused accepted the gratifications of $25,000 and $225,000 as an inducement to him to do an official act as Menteri Besar, Selangor in connection with the HSBC's application for alienation of the T.O.L land.

[264] Reverting back to the instant case, the evidence shows that the Anti-Corruption Agency ("ACA") had investigated Dato' Saidin as a result of the actions of SP1 in accusing Dato' Saidin of corruption, causing Dato' Saidin to be featured in flyers and in the newspapers so that Dato' Saidin would be arrested by the ACA. SP1 clearly regarded Dato' Saidin as a stumbling block in his path towards a successful political career. It is very significant that SP1 did not lodge any police report against Dato' Saidin in the instant case.

[265] It is also very pertinent that SP1 left for overseas the very next day after handing over the cheque in an envelope to Dato' Saidin. This court was of the view that it was so obvious based on the cross-examination of SP1 by the defence and the evidence of SP10, Bill Chin who has categorically said that Dato' Saidin never solicited 1 million for himself and 1 million for the Menteri Besar in order that Nusantara's application will be approved by the State EXCO but merely suggested whether Nusantara can make a political donation of 2 million to UMNO if the project made profit, that SP1 was a blatant liar and that he wanted to fix and frame Dato' Saidin, yet the learned SCJ found his evidence credible and accepted his evidence without corroboration. Having erroneously called for the defence, the learned SCJ erred when she held that the defence had failed to raise a reasonable doubt in the prosecution case. Here Dato' Saidin had called nine witnesses in his defence.

[266] Dato' Saidin's conduct subsequent to the receipt of the RM1 million cheque, P12, also points to his innocence rather than to his guilt. It shows that he did not receive the RM1 million corruptly. The reasons are because Dato' Saidin tried to contact SP1 *via* the telephone but he failed to speak to SP1. Since SP1 had told him that he could make use of the RM1 million, Dato' Saidin promptly banked the cheque into his account. Subsequently at a press conference he publicly announced to all those present that he had received the sum of RM1 million in connection with his business.

[267] SP1 said Dato' Saidin told him it was agreed between SP10, Bill Chin and him (Dato' Saidin) that RM2 million will be paid, RM1 million was for Dato' Saidin and RM1 million for the then Menteri Besar of Selangor. The learned SCJ erred when she

did not expunge this portion of SP1's evidence because it was clearly hearsay, inadmissible and prejudicial to Dato' Saidin. SP10, Bill Chin had testified that he never told SP1 that. SP10 said he merely told SP1 that Dato' Saidin had suggested that if the project made money whether Nusantara could make a contribution of RM2 million from the profits for the UMNO political fund. SP10 referred to a hand written statement of accounts by himself which shows the figure RM2,000,000 against Dato' Saidin's name, P22N.

[268] By virtue of the material and unexplained contradictions in SP1's evidence concerning the issue whether the letter, P13, was given to Dato' Saidin in the envelope together with the RM1 million cheque the learned SCJ ought to have ruled against the prosecution on that issue and to hold that SP1 was not telling the truth, and that there was a reasonable doubt raised in the prosecution case itself whether P13 did exist on 15 March 1997 as was alleged by SP1 and the other prosecution witnesses and whether even if P13 did exist on that date it was given to Dato' Saidin by SP1 together with the cheque as was alleged by SP1. The reason is because it is stated clearly in P13 that the cheque for RM1 million is the contribution from Nusantara to the Selayang UMNO division. SP6 had testified that he prepared P13 upon the insistence of SP9 not SP1. So there was good reason for the learned SCJ to doubt the veracity of SP1's evidence on this issue. It would appear that the puppeteer who was calling all the shots in order to fix and frame up Dato' Saidin was none other than SP1.

[269] The learned SCJ appreciated that there was a serious doubt whether Dato' Saidin did receive the letter, P13, together with the cheque as testified by SP1. However, she erred when she ruled that the issue whether Dato' Saidin had received the cheque together with the letter was not important because Dato' Saidin had accepted the cheque corruptly just because he had banked it into his account.

[270] Had the learned SCJ rejected the unreliable evidence of the prosecution's key witness, SP1, she would have found that the available evidence did not disclose circumstances which show that Dato' Saidin in receiving the RM1 million cheque from SP1 was doing an act knowing that the act was wrong or doing so with evil feelings and evil intentions.

[271] Without SP1's evidence, there was no reliable evidence that Dato' Saidin had corruptly solicited the RM1 million cheque as a bribe for the Menteri Besar in order to induce the Menteri Besar to approve Nusantara's application or as a bribe for Dato' Saidin to assist Nusantara in obtaining the approval of the Selangor State EXCO for Nusantara's application. At the material time Dato' Saidin was not a member of a public body, to wit, the Selangor State EXCO. So Dato' Saidin was in no position to assist in approving Nusantara's application. There is evidence that Dato' Saidin was approached by SP10, Bill Chin, to assist Nusantara in getting Nusantara's application approved. There is also evidence that Dato' Saidin did assist Nusantara's application by doing the acts mentioned earlier. But the learned SCJ had to consider whether by doing the acts mentioned earlier Dato' Saidin had dishonestly caused the State EXCO to approve Nusantara's application bearing in mind that he is charged with corruptly receiving the cheque as a reward for procuring the approval of Nusantara's application by the State EXCO.

[272] However, there is no evidence that Dato' Saidin did the above acts in his capacity as the State Assemblyman for Paya Jaras, that the land was situated within Dato' Saidin's constituency of Paya Jaras, Selayang, and that the directors of Nusantara were constituent members of Dato' Saidin's constituency. There is no evidence that Dato' Saidin had used his official letterhead in any of his dealings with the State EXCO in connection with Nusantara's application. Dato' Saidin also called a press conference to announce that the RM1 million was given to him in relation to his business activities. Nusantara's application was neither put before nor considered by the Land Committee for the district of Gombak and the Development Committee for the district of Gombak of which Dato' Saidin was a member. So again there is no evidence that Dato' Saidin had abused his position in order to favour Nusantara over other applicants in order to benefit himself. SP18 has testified that a State Assemblyman can accept commissions. His evidence is part of the prosecution case to support the charge against Dato' Saidin. So how could it be said that Dato' Saidin had a corrupt mind or evil intentions when he accepted the RM1 million cheque from SP1 or that he had accepted the RM1 million cheque from SP1 with evil feelings?

[273] The learned SCJ ought to have ruled that SP1 was not a truthful witness and she ought to have rejected his evidence that Dato' Saidin had pestered him and pressured him to give Dato' Saidin the money on the ground that his evidence was incredible because there was a very high probability that it was fabricated in order to suit his business concerns and political agenda which were so tightly intertwined, one with the other. Without SP1's evidence there was no evidence before the court that Dato' Saidin had received the RM1 million cheque dishonestly or corruptly together with the letter, P13. Had the learned SCJ anxiously considered this matter she would have ruled that there was no credible evidence that Dato' Saidin received the RM1 million cheque with evil feelings and evil intentions or that the RM1 million cheque was intended as Nusantara's contribution to the Selayang UMNO division for the construction of a new building and was given to Dato' Saidin in his capacity as the head of the Selayang UMNO division.

[274] The learned SCJ also erred when she did not direct herself that as the charge stands SP1 was an accomplice of the first degree and that since ss. 14 and 18 of the PCA 1961 were not applicable to the charge as framed against Dato' Saidin under s. 3(a)(i) of the PCA 1961, she had to find corroboration of SP1's evidence in documentary and circumstantial evidence.

[275] In *Ahmad Shah Hashim*'s case, *supra*, the court found that there was corroboration by documentary and circumstantial evidence.

[276] The learned SCJ also erred when she did not conclude from the evidence adduced by the prosecution and elicited by the defence in cross-examination of the prosecution witnesses that the court had to caution itself that there was a very high probability that SP1 had a motive to maliciously frame and harm Dato' Saidin. She failed to appreciate that based on the following factors it was SP1 who was clearly in control of the whole situation and the others did what he wanted them to do and it was also SP1 who stood to benefit the most from framing Dato' Saidin:

(1) Nusantara which was incorporated on 17 September 1994 with the object of undertaking land development was bought by SP1 as a shell company;

A (2) The Selayang Business Park project was the brainchild of Abu Zarin;

(3) SP1 had asked Bill Chin to set up Adiras so that Adiras could enter into a joint venture agreement with Nusantara
B to undertake the Selayang Business Park project;

(4) SP1 had asked Bill Chin to approach Dato' Saidin for assistance to get Nusantara's application approved by the Selangor State EXCO;

C (5) After Nusantara's application was approved by the State EXCO, Adiras was unable initially to obtain a loan from Maybank to pay the land premium;

(6) Subsequently, Adiras was successful in obtaining a loan from
D MBSB to pay the land premium and to finance the project;

(7) Yet SP1 terminated the joint venture agreement between Nusantara and Adiras;

(8) SP1 then approached Edward Lee from Penaga Ventures
E Sdn Bhd to enter into a new joint venture agreement with Nusantara to undertake the Selayang Business Park project;

(9) Subsequently, upon his invitation, Frankie Lee who was one of Bill Chin's co-directors in Adiras also crossed over to join
F Nusantara;

(10) There was a very high probability that SP1 gave the RM1 million cheque to Dato' Saidin in Dato' Saidin's house without the letter, P13, in the middle of the night to make it appear that its receipt by Dato' Saidin was surreptiously
G done and, therefore, done with evil feelings and intentions;

(11) SP1 as a chartered accountant would know that once a cash cheque is crossed it has to be banked into an account;

H (12) Even Nusantara's shareholders did not find SP1 trustworthy because they were afraid that SP1 would take the RM1 million cheque for himself as SP1 himself did not issue a receipt for it;

I (13) SP1 did not write officially to ask Dato' Saidin for a receipt for the RM1 million;

(14) SP1 also did not raise the matter concerning the receipt for the RM1 million cheque with Dato' Saidin at any of the UMNO Selayang division meetings; A

(15) Bill Chin who was dissatisfied with the wrongful termination of the joint venture agreement had also asked Dato' Saidin for help to get RM2 million compensation from SP1; B

(16) SP11 and SP16 had also complained to Dato' Saidin that SP1 had not paid the monthly allowance of SP16 although it was two days to Hari Raya Puasa and subsequently they complained to Dato' Saidin that SP1 stopped their monthly allowances altogether; C

(17) Subsequently, SP11 was terminated as a director from Nusantara and he and SP16 then set up their own company and upon encountering financial problems they again approached Dato' Saidin for financial assistance and the latter gave them RM230,000; D

(18) It was only one year and five months after Nusantara's application was approved by the State EXCO, that SP1 gave the RM1 million cheque to Dato' Saidin; E

(19) It was only one year later after giving the RM1 million cheque to Dato' Saidin that SP6, Frankie Lee, upon the instigation of SP1 wrote the letter of complaint, D16, to DSAI and SP1, himself, also personally wrote a letter of complaint, D15, to DSAI raising for the very first time the alleged embezzlement of the RM1 million cheque by Dato' Saidin; F

(20) SP1 did not lodge any report with the police or with the ACA before giving Dato' Saidin the RM1 million cheque; G

(21) Yet he sent an intermediary, Dato' Abdul Rahim bin Osman, to confront Dato' Saidin with a photostat copy of the cheque on the eve of the elections for the post of division head of Selayang UMNO and a threat thinly disguised as a polite request to Dato' Saidin to withdraw from defending his post or else be prepared to face disastrous consequences; H

(22) Upon being so confronted and threatened, Dato' Saidin did not display fear or anxiety; I

(23) On the contrary he appeared happy and he told Dato' Abdul Rahim bin Osman that the cheque was a business deal between him and SP1; and

(24) Dato' Abdul Rahim bin Osman has also said that he has no background knowledge of the cheque.

[277] Although a conviction based purely on the oral evidence of SP1 in the instant appeal can be sustained where no prior report has been lodged with the police or the ACA because of the best evidence rule the trial judge must be convinced that the complainant is telling the truth and there is corroboration in the form of documentary and circumstantial evidence. Nevertheless, the absence of a prior police report can affect the credibility of a witness and the veracity of his evidence if there are unsatisfactory features surrounding his oral evidence in court.

[278] At the close of the prosecution case, there was clearly insufficient evidence for the learned SCJ to call for Dato' Saidin's defence.

[279] Evidence was also given of the unprofessional and improper manner in which the ACA officers had gone about their investigations in this case including the recording of the statements of some of the witnesses in a hotel room which was paid for by SP1. Yet the learned SCJ did not make any adverse comment on the matter in her written grounds of judgement. Emphasis was instead placed on the evidence of SP1 that Dato' Saidin had asked and demanded for the RM1 million in order to prove that the RM1 million was received by Dato' Saidin corruptly. There is, therefore, a grave error on the part of the learned SCJ which has occasioned a serious miscarriage of justice.

[280] The learned SCJ erred when she did not pay serious attention to the fact that Dato' Saidin has lodged a police report against SP1 for blackmailing him through an intermediary, namely, SP24, Dato' Abdul Rahim bin Osman. If she had done so she would have found that there was a reasonable doubt raised in the prosecution case that the receipt of the cheque by Dato' Saidin was done in the course of a lawful and legal business deal between SP1 and Dato' Saidin and not corruptly as was made out to be by SP1 in order to achieve his own devious and malicious object of framing Dato' Saidin.

[281] This court was, therefore,of the view that the contention of Dato' Saidin that no *prima facie* case was made out based on the evidence adduced by the prosecution at the close of the prosecution case had merits.

2nd Sub-Issue: If The Answer To The 1st Sub-issue Is 'Yes', Whether There Was Sufficient Evidence Before The Learned SCJ That The Corrupt Receipt Of The RM1 Million Gratification Was As Remuneration For Dato' Saidin's Assistance In Procuring Or Obtaining The Approval Of The Selangor State EXCO In Respect Of Nusantara's Application?

[282] Although the evidence of the prosecution witnesses show that Nusantara's application was subsequently approved by the Selangor State EXCO, the then Menteri Besar of Selangor, Muhamad bin Muhamad Taib, SP18, who was called to testify, confirmed that Nusantara's application was approved by the Selangor State EXCO based on its merits. SP18 also confirmed that Dato' Saidin was never a member of the Selangor State EXCO at the material time. Dato' Saidin was only a State Assemblyman. SP18 also said that in his capacity as a State Assemblyman, there was nothing wrong in Dato' Saidin being paid a commission for assisting Nusantara's application because that act did not contravene any law or regulation.

[283] SP15, Zulkepli bin Ahmad, the Secretary of the State EXCO at the material time said that Dato' Saidin had met him to ask him for his assistance to refer Nusantara's application for the land to the Menteri Besar for it to be tabled before the State EXCO. Nevertheless, SP15 also said that Nusantara's application for the land was dealt with on a first come first served basis and was not expedited.

[284] This court was of the view that the learned SCJ erred when she did not consider that it is the prosecution's case that Nusantara's application succeeded on its own merits. So the 4th ingredient in the charge that Nusantara's application succeeded because of the assistance given by Dato' Saidin remains unproven. On this ground alone the appeal by Dato' Saidin against his conviction, sentence and penalty has merits and ought to be allowed.

2nd Main Issue: Whether The Learned SCJ Erred When She Invoked s. 8 Of The Act Against Dato' Saidin Without First Giving Notice To The Defence Of Her Intention To Do So?

[285] The court was of the view that the 2nd main issue has merits and that the learned SCJ's reliance on s. 8 of the Act in convicting Dato' Saidin without first giving notice to the defence of her intention to do so was erroneous.

[286] Section 8 of the Act provides as follows:

> 8. *Any person who* offers to a member of Parliament or a State Legislative Assembly, or, *being a member thereof* solicits or *accepts, any gratification as* an inducement or *reward for his doing* or forbearing to do *any act or for showing* or forbearing to show *any favour* or disfavour *in his capacity as member, shall, notwithstanding that the member did not have the power, right or opportunity so to do, show or forbear to show any favour or disfavour, or that he did not in fact so do, show or forbear to show any favour or disfavour, or that the* inducement or *reward was not in relation to the affairs of* Parliament or *a State Legislative Assembly*, as the case may be, *be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding seven years or to both.* (emphasis added).

It is clear from the punishment which is provided in the section that the offence in s. 8 is more serious than the one in s. 3(a)(i) of the PCA 1961. It is also clear from s. 152 of the Criminal Procedure Code ("CPC") that every charge must give sufficient notice to the accused of the offence with which he is charged so that he can prepare for his defence adequately.

[287] The section provides as follows:

> **Form of charge**
>
> 152(1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) ...

[288] It is also clear from s. 156 of the CPC that no error in stating either the offence or the particulars required to be stated in the charge is material unless the accused was in fact misled by that error or omission.

[289] The section provides as follows:

Effect of errors

156. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[290] Section 158 of the CPC confers discretion on the learned SCJ to alter or add to the charge at any time before judgment is pronounced. However, since an offence under s. 8 of the PCA 1961 is more serious than the one stated in the charge she could not have amended the charge to one under s. 8 of the PCA 1961 even if she was minded to do so at the close of the prosecution case. That section provides as follows:

Court may alter or add to charge

158. (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

[291] Since s. 158 of the CPC is inapplicable, the same goes for ss. 159 and 160 of the CPC.

[292] Section 159 of the CPC provides as follows:

When trial may proceed immediately after alteration or addition

159. If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.

[293] Section 160 of the CPC provides as follows:

When new trial may be directed or trial suspended

160. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

[294] This court is of the view that the Privy Council case of *Walter Annamunthodo v. Oilfields Workers' Trade Union, supra*, which was cited by Dato' Muhammad Shafee, is applicable to the facts of the present appeal. In that case, the appellant, a member of a trade union, was charged before the General Council of the union with offences against certain of the union rules. There was no power under those particular rules to expel him, since expulsion thereunder could be ordered only in the case of second or third offences and these were the first alleged against the appellant, for which under those rules a small fine only could be imposed. The appellant having been convicted of the offences charged, the General Council purported to expel him under another rule, r. 11(7), under which he had not been charged, which provided for expulsion where a member had been guilty of "conduct prejudicial to the interests of the union". In an action by the appellant against the union claiming that his purported expulsion was *ultra vires* and void the Judicial committee of the Privy Council held as follows at p. 954:

> Rule 11(7) created a separate and distinct offence and should not have been invoked for the purpose of expelling the appellant unless he had been given notice of the charge under it and had had a fair opportunity of meeting it. If a domestic tribunal formulated specific charges which led only to a fine, it could not without notice resort to other charges which led to far more serious penalties.

[295] The Judicial Committee of the Privy Council was, therefore, of the view that judgment must be entered in favour of the appellant and that the decision of the General Council which convicted the appellant of an offence against the rules with which he had never been charged must be set aside and the purported expulsion declared invalid.

[296] Lord Denning who delivered the judgment of the Judicial Committee of the Privy Council said as follows at pp. 954 to 955:

> The first question is: Did rule 11(7) create a separate and distinct offence of "conduct prejudicial to the interests of the "Union"? – for in that case it ought to have been separately charged – or did rule 11(7) merely empower the General Council to impose more severe penalities for the various other offences specified in the rules provided that the conduct of which he was convicted under them was prejudicial to the interests of the union" – for in that case rule 11(7), so it was said, need not be separately charged, but only the other offences. Phillips J. In the Supreme Court and Archer and Rennie JJ. In the Federal Supreme Court thought that rule 11(7) only empowered the General Council to impose more severe penalties and sought support for this view from some observations of Eve J. In *Wolstenholme v. Amalgamated Musicians' Union.*[1] But Wylie J thought it created a separate and distinct offence, and their Lordships agree with him. As he said, "it stands entirely on "its own, authorising expulsion of a member who is proved to "the satisfaction of the General Council 'to have been guilty' 'of conduct prejudicial to the interests of the Union.'" In the opinion of their Lordships it should not have been invoked for the purpose of expelling Walter Annamunthodo unless he was given notice of the charge under it and had a fair opportunity of meeting it.
>
> But even if rule 11(7) only empowered more severe penalties, nevertheless those severe penalties could only be imposed when the conduct was prejudicial to the interests of the union: and their Lordships think that, even on that view, the rule should not have been invoked without giving Walter Annamunthodo notice of it.

> Mr. Lazarus sought to treat the specific formulation of charges as immaterial. The substance of the matter lay, he said, in the facts alleged in the letter as to the meetings which Walter Annamunthodo had attended and the allegations he had made. Their Lordships cannot accede to this view. If a domestic tribunal formulates specific charges, which lead only to a fine, it cannot without notice resort to other charges, which lead to far more severe penalties.

and at p. 956:

> Mr Lazarus did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside.

[297] Similarly in the instant appeal, there was a gross breach of natural justice by the learned SCJ. Dato' Saidin was never charged under s. 8 of the PCA 1961. The offence under s. 8 of the PCA 1961 is a separate and distinct offence. It is also more serious than an offence under s. 3(a)(i) of the PCA 1961. Section 8 does not merely provide for enhanced penalties. It follows, therefore, that the learned SCJ could not have called for Dato' Saidin's defence under s. 8 of the Act even if she had wanted to. The reason is because since the offence in s. 8 is more serious than the one specified in the charge against Dato' Saidin, the decided cases show that it is not for the court to substitute a more serious charge for a less serious charge as it is the prerogative of the Public Prosecutor being the custodian of the public interest to elect to charge Dato' Saidin under s. 3(a)(i) of the PCA 1961 instead of under s. 8 of the PCA 1961.

[298] In the Malaysian case of *Che Man Che Mud v. Public Prosecutor* [1994] 4 CLJ 823, which was also cited by Dato' Muhammad Shafee, the appellant faced a principal charge and two alternative charges of abetting the charges of theft alleged against one Harun in the Sessions Court. The appellant claimed trial on all three charges but was convicted on the alternative charge of abetment of theft on circumstantial evidence and was sentenced,

in consequence, to four years imprisonment and ordered to pay Bank Negara RM333,000. His appeal to the High Court was allowed. The learned High Court judge, Dato' Abdul Aziz bin Mohamad J (as he then was) refused to amend the charge although the prosecution had submitted that there was sufficient evidence of the offence of abetment of cheating the Management of Bank Negara by Harun because he found that based on the evidence before the Sessions Court the appellant did not abet the commission of the offence of cheating by Harun whether by instigation, by conspiracy, or by aiding.

[299] With respect this court is of the view that that case is inapplicable here because the offence in s. 8 is a distinct, separate and more serious offence than the one specified in the charge against Dato' Saidin.

[300] In view of what is stated above this court was of the view that the learned SCJ erred when she did not consider the issue whether the prosecution had succeeded in showing that the receipt of the gratification was done corruptly by Dato' Saidin independently of s. 8 of the PCA 1961.

[301] The court was of the view that the learned SCJ's grounds of judgment were written in the year 2002 as dated by her and that the reason why she did not supply them to the learned counsel for Dato' Saidin as soon as they were completed or within a reasonable time thereafter was most probably because she had intended initially to make her grounds of judgment more detailed and elaborate but, unfortunately, due to a heavy workload she could not find the time to do it. So after a lapse of two years she then decided to supply the grounds of judgment which she had already written in the year 2002 to Dato' Saidin's learned counsel in 2004. This explains why the grounds were not supplied to the appellant's learned counsel in the year 2002.

[302] In her grounds of judgment she has referred to s. 8 of the PCA 1961. She has also commented that had the prosecution charged Dato' Saidin under s. 8 of the PCA 1961 instead of under s. 3(a)(i) of the same Act the prosecution could have easily established the ingredients of the offence because in her view the burden is lighter on the prosecution under s. 8 of the PCA 1961 and yet the punishment is more serious. Here there is evidence that Dato' Saidin did help Nusantara in its application for the land

by doing certain acts. So the learned SCJ could have presumed that under s. 8 of the PCA 1961, the prosecution need only prove that Dato' Saidin was a State Assemblyman at the material time and that he had accepted the gratification, to wit, the cheque as a reward for his doing those acts, to wit:

(1) he obtained a copy of Nusantara's working paper in respect of its application for the land;

(2) he then made some amendments to the working paper;

(3) he met and spoke to SP15, the Secretary to the Selangor State EXCO to refer Nusantara's application to SP18, the then Menteri Besar with the hope that it can be tabled at the meeting of the Selangor State EXCO; and

(4) he handed over the letter of approval of the Selangor State EXCO dated 4 November 1995 to SP11.

in his capacity as a State Assemblyman, and he shall have committed the offence under s. 8 of the PCA 1961, notwithstanding that he did not have the power, right or opportunity to do the acts as set out above or to show favour to Nusantara, or that the reward, to wit, the cheque which he received was not in relation to the affairs of the Selangor State Legislative Assembly.

[303] In the instant case, Dato' Saidin was charged under s. 3(a)(i) of the PCA 1961. The court is of the view that the prosecution must prove that Dato' Saidin received the gratification, to wit, the RM1 million crossed cash cheque corruptly as a reward for helping Nusantara to procure the approval of the State EXCO for its application for the land. This means that if Dato' Saidin had not done the acts as stated earlier Nusantara's application for the land would not have succeeded. But there is not an iota of evidence before the learned SCJ to establish that. On the contrary SP18, the then Menteri Besar, said Nusantara's application succeeded on its own merits.

[304] With respect to Shankar J (as he then was) I was of the view that on this issue the decision of Mohd Azmi J (as he then was) in *Mohamed Kassim*'s case that the correct charge ought to be for cheating and not for corruption is to be preferred over Shankar J's decision in *You Kong Lai*'s case, *supra*.

[305] The next question which arises is whether Dato' Saidin can receive the RM1 million cheque as remuneration for having performed those acts? This court is of the view that unless and until there is clear and cogent evidence that such a receipt is prohibited by a clear provision of the law whether contained in s. 8 of the PCA 1961 or elsewhere in another law, or that Dato' Saidin had corruptly solicited for the cheque or that the circumstances show that Dato' Saidin had a corrupt mind or evil intentions and evil feelings when he received the cheque, the prosecution has failed to prove that the receipt was done corruptly by Dato' Saidin.

[306] The prosecution case is also inconsistent. This is because the prosecution has led evidence that the RM1 million is a contribution to the Selayang UMNO division. The evidence comes from some of the witnesses. They wanted a receipt from SP1 because it was SP1 who took the money and the cheque was not issued in the name of SP1 or Dato' Saidin. Instead it was written as a cash cheque and crossed and was intended by Nusantara to be given to Dato' Saidin as a contribution to the Selayang UMNO. Yet the contribution was disguised as a payment to one of its sub-contractors because it was recorded in the cheque butt as having been issued in the name of Mikawa Sdn. Bhd., one of Nusantara's sub contractors. So, one set of evidence led by the prosecution shows that there is a possible offence of criminal breach of trust ("CBT") committed by SP1 and Dato' Saidin, to wit, SP1 who was entrusted with the cheque took the cheque under false pretences, issued no receipt and in turn gave the cheque to Dato' Saidin. But subsequently, SP1 testifies in court that it was a bribe demanded by Dato' Saidin for SP18, the then Menteri Besar to induce the latter to approve Nusantara's application for the land. But what SP1 has said in court could not be true because if it was true SP1 would have paid the bribe to Dato' Saidin before the State EXCO approved Nusantara's application or very soon after that and certainly not one year and five months after the approval of Nusantara's application.

[307] Therefore, at the end of the prosecution case there was no *prima facie* case made out against Dato' Saidin even though the prosecution had succeeded in showing that the money had been credited into Dato' Saidin's bank account. SP18 has said a State Assemblyman can receive commissions for lobbying the State

EXCO and that it was not against the law. Neither SP15 nor SP18 has said that s. 8 of the PCA 1961 prohibits such an act and makes it an offence. Furthermore,the Speaker of the Selangor State Assembly was not called to testify that the receipt by Dato' Saidin of the cheque as a remuneration or as a consideration for the acts or services performed by him for Nusantara contravened s. 8 of the PCA 1961or any other law.

[308] As started earlier it is very significant that SP1 did not lodge a police report to complain that he was forced by Dato' Saidin to give him the cheque for RM1 million. Only when he wanted to contest the Selayang UMNO division head's post, did he send SP24 to intimidate Dato' Saidin with a copy of the cheque and to ask him to withdraw from contesting or face dire consequences.

[309] The instant case is clearly distinguishable from *Thavanathan*'s case, *supra*, where the Federal Court found that there was no evidence that PW4 who delivered the money to Thavanathan had maliciously wanted to harm Thavanathan. In the instant case there was ample evidence before the learned SCJ that SP1 had maliciously wanted to harm Dato' Saidin.

[310] At p. 422D-H, Chong Siew Fai CJ (Sabah and Sarawak) in delivering the judgment of the Federal Court said as follows:

> Under the law of our land, there is no presumption of PW4, even assuming he was an accomplice, being unworthy of credit by the mere reason of his delivering the money to the accused (see s. 18 of the Prevention of Corruption Act 1961). Furthermore, on the accused's own evidence, he and PW4 had a cordial relationship while maintaining their respective positions. There is not even a suggestion, let alone evidence, that PW4 had maliciously wanted to harm the accused. On this last point, the learned appellate judge, in our opinion, had properly addressed his mind when he said in his judgment (at p. 40 of the appeal record) also at p. 446I):
>
> > I have warned myself that corrupt money can easily be planted or that an innocent man can be quickly framed but from all the evidence gathered by the sessions court judge this cannot be so in our case.
>
> As to the consideration of the defence, the learned appellate judge said (at pp. 38-40 of the appeal record) (also at p 446C-H):

> The evidence of the accused [the respondent here] and DW2 is, in my opinion, insufficient to rebut the element of the charge ... . On all the evidence that the sessions court had, I am of the opinion the court cannot fly in the face of the facts. ...
>
> Then once there was a finding that corrupt money was passed (or in this case handed) to the respondent, it was up to the respondent to rebut that the money was not corrupt money or show it was innocently given ... This was not satisfactorily explained.

[311] So there is a reasonable doubt raised by the defence in the prosecution case itself because SP1 told the signatory of the cheque the RM1 million is for the building fund of the Selayang UMNO division but he also testified that he gave it to Dato' Saidin for Dato' Saidin himself to do whatever he wanted to do with the money. SP10, Bill Chin said the RM2 million is supposed to be a contribution to the UMNO building fund. Was it received corruptly by Dato' Saidin or was it received as remuneration for services rendered by Dato' Saidin? The prosecution must establish this element at the close of the prosecution case and prove this element beyond reasonable doubt at the close of the defence case.

[312] The case of *Attorney-General of Ceylon v. De Livera and Anor* [1962] 3 All ER 1066 is not applicable to the instant appeal because the facts in that case differ materially from the facts in the instant appeal.

[313] In that case, M., a member of the House of Representatives for a constituency in Ceylon, wrote to the Minister of Lands and Land Development recommending that the Vincent Estate, which was in his constituency and was owned by the first respondent, should be acquired under statutory authority for the benefit of certain persons in his constituency whose homes had been ruined by floods. The minister accepted the recommendation and the first respondent visited the government agent and informed him that the Vincent Estate itself was liable to flooding and was unsuitable for the purpose for which it was being acquired. The government agent referred the first respondent to M. as the person who had advanced the proposal for acquisition. At interviews between M. and the first respondent, the second respondent being present, the first respondent offered M. Rs,5,000 to stop the acquisition, and M. purported to agree to give and, in exchange for the money,

A handed to the first respondent a letter, addressed to the minister, signed by M. as member for the constituency, withdrawing his application for the acquisition. The police who were present, concealed, at the interviews then took possession of the letter and money. The subsequent convictions of the first respondent on a
B charge of offering gratification to M., a member of the House of Representatives, as an inducement for doing an act "in his capacity as such member" contrary to s. 14 of the Ceylon Bribery Act 1954, and of the second respondent of having abetted the offence, having been set aside on appeal to the Supreme Court
C of Ceylon.

[314] The Judicial committee of the Privy Council held that if facts showed clearly that a member of Parliament had been brought into a matter of government action which affected his
D constituency, that his intervention was attributable to his membership and that it was recognised as a prevailing practice that the government department concerned should consult the local member of Parliament, then any action taken by him in approaching the department on the matter was taken "in his
E capacity as member" of Parliament and within s. 14 of the Act of 1954, for the scope of actions so taken was not limited to acts which a member was legally entitled to take only by virtue of his membership of Parliament; in the present case the acts of M. towards approaching the minister to withdraw the application for
F compulsory acquisition were acts done in his capacity as member of Parliament and the convictions should be restored.

[315] Even assuming that the charge against Dato' Saidin is one under s. 8 of the PCA 1961, the case cited above can be
G distinguished from the case in the instant appeal. The reason is because in that case there was evidence that M was induced by money to intervene to stop the compulsory acquisition of the land in his capacity as a member of Parliament by withdrawing his initial application which had been accepted by the Minister for the
H acquisition for the land for the benefit of certain persons in his constituency whose homes had been ruined by floods. In the instant appeal there is no credible evidence which was corroborated by reliable documentary and circumstantial evidence that Dato' Saidin was induced by money to perform acts which
I were detrimental to his constituent members.

3rd Main Issue: Whether This Court Ought To Dismiss Dato' Saidin's Appeal Against His Conviction And Sentence And Substitute The Principal Charge Under s. 3(a)(i) Of The PCA 1961 To A Distinct Charge Under s. 8 Of The PCA 1961 In Exercise Of The Discretion Conferred On The Court By ss. 166, 167 And 316(b) Of The CPC?

[316] In the case of *Sivalingam v. Public Prosecutor* [1982] 1 LNS 20; [1982] 2 MLJ 172 the Federal Court had to consider the provisions of ss. 158, 162, 166, 167 and 316(b) of the CPC in a reference under ss. 66 of the Courts of Judicature Act 1964 in deciding a question of law of public interest concerning the issue whether the appeal court can substitute a different charge in an appeal by an accused against his conviction and sentence.

[317] The question reads as follows at p. 172 E-F:

> That when an accused is convicted and sentenced for an offence under section 420 of the Penal Code in a Sessions Court and then appeals against conviction and sentence to the High Court, the question arises whether in law, the appellate judge in dismissing the appeal against conviction and sentence can then proceed to substitute the principal charge under section 420 to a distinct charge under section 409 of the Penal Code without having regard to section 158 and section 162 of the Criminal Procedure Code.

[318] Section 166 of the CPC provides as follows:

> **Where it is doubtful what offence has been committed**
>
> 166. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of those offences; and any number of the charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

[319] Section 167 of the CPC provides as follows:

> **Where a person charged with one offence can be convicted of another**
>
> 167. If in the case mentioned in section 166 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

[320] The Federal Court decided that while, there is power of a High Court on appeal to alter or substitute a finding the question posed must be answered in the negative. It then decided that ss. 166 and 167 of the CPC were not applicable to the facts of the case and the substitution of a conviction under s. 409 of the Penal Code could not be said to have been validly made having regard to the circumstances of the case and on the evidence before the High Court. The Federal Court noted that the necessary ingredients of a charge under s. 420 of the Penal Code and s. 409 of the Penal Code were not exactly the same and that the President of the Sessions Court was never called upon to consider whether the necessary ingredients of s. 409 of the Penal Code were established. The Federal Court was also of the view that ss. 158 and 162 of the CPC referred to in the question reserved were not relevant to the determination of the question posed because the lower court had already convicted and imposed sentence on the applicant.

[321] In delivering the judgment of the Federal Court, Abdul Hamid FJ said as follows at p. 174 B-H in the left hand column:

> Our law clearly allows the Judge of a High Court in an appeal against conviction to alter a finding. Section 316(b) provides that power. This is consistent with section 26 of the Courts of Judicature Act which states that the appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Courts according to any law for the time being in force within the territorial jurisdiction of the High Court. Certain provisions of the Criminal Procedure Code general in nature are also relevant for purposes of hearing such appeals. Sections 166 and 167 of the Criminal Procedure Code are examples of such provisions. In hearing an appeal from a conviction the power of the judge to alter a finding must in our view be exercised subject to section 166 and 167 of the Criminal Procedure Code.
>
> The requirements of sections 166 and 167 of the Criminal Procedure Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. Although therefore an appellate court is possessed of the power which it can lawfully exercise, it is equally essential that such power be exercised within the confines of the law. The question is to what extent and under what circumstances such power can be invoked. What is clear in our minds is, and we emphasise, that such power must be

exercised under limited circumstances and with great caution subject to the restriction imposed by section 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.

In our view *Ng Ee*'s case was correctly decided and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established against the accused in the court below. To put it in another way before there can be an alteration of a finding the appellate court must be satisfied that if the substituted charge had in fact been the original charge, the proceedings at the trial would have taken the same course, and the evidence recorded have been same. Further, if the substituted charge was one of the charges preferred against the accused or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge and the accused's evidence must have been substantially unchanged in that the accused's defence would have been the same.

[322] The case cited above is inapplicable to the facts in the present appeal because an offence under s. 8 of the PCA 1961 is a distinct and more serious offence than the offence stated in the charge. Even assuming for the moment that an offence under s. 8 of the PCA 1961 is a less serious offence than the offence stated in the charge and the first condition as laid down in the case cited above has been satisfied ie that the evidence as it stood would have been sufficient to to satisfy the elements to constitute the charge the second condition that Dato' Saidin's defence would have the same has not been satisfied.

Conclusion

[323] In view of the matters mentioned above this court was satisfied that the learned SCJ had misdirected herself when she ruled at the end of the prosecution case that the prosecution had established a *prima facie* case against Dato' Saidin as per the charge. This court, accordingly, allowed his appeal, set aside his conviction, sentence and penalty and also dismissed the cross-appeal of the Public Prosecutor.